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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 640.

JULIUS BLOCK, TRADING AND CARRYING ON BUSINESS UNDER THE NAME AND STYLE OF WHITES, PLAINTIFF IN ERROR,

vs.

LOUIS HIRSH.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 6, 1920.

(27,997)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 27, 1920.

Court of Appeals of the District of Columbia.

No. 3454.

JULIUS BLOCK, &c., Appellant,

vs.

LOUIS HIRSH.

---

a Supreme Court of the District of Columbia.

At Law.

No. 63304.

LOUIS HIRSH, Plaintiff,

vs.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of Whites, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

1 *Complaint in the Municipal Court.*

Filed January 28, 1920.

In the Supreme Court of the District of Columbia.

At Law.

No. 63304.

LOUIS HIRSH, Complainant,

vs.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of Whites, Defendant.

Louis Hirsh, a citizen of the United States and a resident of the District of Columbia, complains to the Municipal Court of the District of Columbia, for that the above named defendant, Julius Block, a resident of the District of Columbia, trading and carrying on business therein under the name and style of Whites, and being the tenant under a lease of the cellar and first floor, excepting the stairway to second floor, of certain premises known and designated as Number 919 "F" Street, Northwest, in the City of Washington, District of Columbia, now unlawfully detains possession of the said property so leased to him, after his tenancy therein has expired, and the complainant, Louis Hirsh, is the person aggrieved by such unlawful detention of possession. And as grounds for this complaint, the said complainant, Louis Hirsh alleges that heretofore, to-wit, on, and prior, to the first day of December, A. D., 1916, Mary A. Cushing and Isabella Varney were seized in fee simple and in lawful possession in their own right of lot numbered sixty-four (64) in the subdivision made by the President and Directors of Gonzaga
2 College of lots in Square numbered three hundred and seventy-six (376) in the City of Washington, District of Columbia, as said subdivision is recorded in Liber 11, folio 44 of the records of the Surveyor's Office of the District of Columbia, on which said lot the said demised premises Numbered 919 "F" Street, Northwest, in said City, then stood and now stand, and, being so seized, they authorized one John T. Knott, who was their agent in charge of said real estate, to lease the same, and the said John T. Knott did, on the said first day of December, A. D., 1916, lease the said first herein described premises, to-wit the said cellar and first floor excepting the stairway to the second floor of premises Number 919 "F" Street, Northwest, to the defendant, Julius Block, trading as Whites, and the said John T. Knott and Julius Block signed and sealed a said deed of lease now shown to the Court here, and a full, true and correct copy whereof is filed herewith, marked Exhibit A, and made part of this complaint, whereby the said premises were let and rented unto the said defendant Julius Block for the term of

three years, commencing on the first day of January, A. D., 1917, and ending on the thirty-first day of December, A. D., 1919, and wherein the said defendant, Julius Block agreed among other things that he would at the end of his tenancy surrender the said leased premises, and that said lease should bind the executors, administrators, heirs and assigns of the respective parties to said lease, and that said defendant, Julius Block entered into possession of said premises under said lease and paid the rent thereunder according to its terms, and so continued to do throughout the term in said lease
3 demised. That on the 12th day of November, A. D., 1919, the said Mary A. Cushing and Isabella Varney sold, and by good and sufficient deed, now shown to the Court here, granted and conveyed in fee simple the said described real estate and all the improvements thereon, with covenant of Special Warranty, unto one Sylvan J. Luchs, and the said deed was duly filed for record on the 13th day of November, A. D., 1919, in the Office of the Recorder of Deeds for the District of Columbia. That on said 12th day of November, A. D., 1919, the said Sylvan J. Luchs by good and sufficient deed, now shown to the Court here, granted and conveyed in fee simple, the said described real estate and all the improvements thereon to this complainant, and the said deed was duly filed for record on the 13th day of November, A. D., 1919, in the office of the Recorder of Deeds for the District of Columbia. That on the said 13th day of November, A. D., 1919, the said John T. Knott duly and in writing transferred and assigned the said hereinbefore mentioned agreement of lease of said premises to the co-partnership of Shannon and Luchs, and on the same day the said Shannon and Luchs, in writing, duly assigned and transferred the said agreement of lease unto Louis Hirsh, this complainant, and this complainant then authorized the said firm of Shannon and Luchs, as the agents of this complainant, to collect and receive from said defendant, Julius Block, the rent to accrue due for the month of December, A. D. 1919, under said agreement of lease, and on the third day of December, 1919, the said defendant, Julius Block, paid to said Shannon and Luchs the rent for the month of December, A. D. 1919, due under said lease. This complainant further al-
4 leges that said sale and conveyance of said real estate by said Mary A. Cushing and Isabella Varney to Sylvan J. Luchs, and the said sale and conveyance of said real estate by Sylvan J. Luchs to this complainant were actual and in good faith; that the said Sylvan J. Luchs acted in said matter as the agent of this complainant; that this complainant furnished the consideration for the said sales and conveyances; that he is a bona fide purchaser of the said real property for his own occupancy and requires and intends to occupy and to use the same himself for the conduct therein of the business of retail selling of men's furnishings and similar merchandise. That the defendant's rights of possession of said premises under said lease terminated by the terms of said lease, on the 31st day of December, A. D. 1919. That on December 15, 1919, this complainant notified said defendant, in writing, that complainant had purchased said premises and would require possession thereof

at the expiration of said lease on December 31, 1919, and on January 2, A. D., 1920, the said Block tendered to this complainant two hundred and fifteen dollars ($215) as rent for the month of January, 1920, which this complainant refused to accept, and on said second day of January, 1920, this complainant demanded possession of said premises from said Block, but said defendant failed and refused to surrender such possession and now unlawfully detains possession of the said property leased to him after his tenancy has expired.

This complainant therefore prays that this Court will issue a summons to the said defendant, Julius Block, commanding him to appear herein and show cause why judgment should not be
5 given against him for restitution of the possession of said premises in said lease described.

LOUIS HIRSH.

DISTRICT OF COLUMBIA, ss:

I, Louis Hirsh, do solemnly swear that I am the complainant named in the annexed and foregoing complaint against Julius Block and that I signed the same. That I have personal knowledge of the facts therein stated and that the same are true.

LOUIS HIRSH.

Subscribed and sworn to before me this fifth day of January, A. D., 1920.

[SEAL.]

KATHERINE A. BAKER,
Notary Public, D. C.

MYER COHEN,
WM. G. JOHNSON,
RICHARD D. DANIELS,
Attys. for Complainant.

"EXHIBIT A."

This agreement made this first day of December A. D. one thousand nine hundred and sixteen (1916), by and between John T. Knott of District of Columbia party of the first part, and Julius Block (trading as Whites) of the same place party of the second part, hereinafter described as lessor and lessee, respectively:

Witnesseth, That the said lessor, for and in consideration
6 of the sum of Twenty five hundred and eighty Dollars ($2,580) rent, per year and also the covenants, conditions, and agreements herein contained, and on the part of the lessee to be paid, kept, and performed, and for no other consideration except as herein expressed, doth hereby let and rent to the said lessee and he has hereby taken as tenant of the lessor the following described premises, situate, lying and being in the City of Washington, D. C. and known and designated as and being all of store room, including one story addition situate upon and constituting the ground floor (excepting stairway to second floor) of 919 F St. N. W. including the cellar under said store for the term of three years to commence

with the first day of January A. D. 1917, and to end on the 31 day of December A. D. 1919, at the said yearly rent of Twenty five hundred & eighty Dollars ($2,580), payable without demand at the office of John T. Knott (unless otherwise directed) in monthly installments of Two hundred & fifteen Dollars in advance on the first day of each and every month during said term, beginning for the first of said payments on the first day of January 1917, the receipt of one dollar ($1) of said rent paid by said lessee is hereby acknowledged by said lessor and the rent $215 for month of January Privilege to have painting, papering and getting ready to open Jan. 1st is hereby given.

And the said lessee covenants and agrees to pay said lessor the said rent as aforesaid for the full term hereof; that he will not assign this lease or any portion of the term, or sublet the premises or any part thereof, without the written consent of the lessor; that said lessee will not use or suffer to be used said premises for any disor-
7 derly or unlawful purpose, or for any other purpose than store for ladies' wear; that he will not suffer or commit any waste to, in, or upon the said building, fixtures, and premises; that he will at his own expense during said term keep said leased premises, including the store, fixtures, plumbing so far as relates to toilets & basin connected with the store and appurtenances thereof in substantial condition and in good repair, clean, and in good working order and proper sanitary condition, all of which premises are now in such condition and repair, remove snow and ice from the sidewalks thereof, and the lessor or his assigns shall not be liable therefor or for any work or materials furnished said premises, and the said lessee has no authority to incur any debt or make any charge against the lessor or — assigns or create any lien upon said leased property for any work or materials furnished the same.

And the lessee agrees that he will at the end of his tenancy surrender the said leased premises in such substantial condition and good repair, good working order, etc., as aforesaid, and clean, ordinary wear and tear and loss by fire and storm excepted; that he will also pay all charges for gas, electricity, and ¼ of the water used on said premises (the whole building) when the bills therefor become due and payable; that he will not make any alterations or changes in said premises, without written consent, or increase the rate of fire insurance upon the building and improvements upon said premises beyond an ordinary risk.

It is further agreed that payment of rent shall cease if the said premises shall be destroyed by fire, or be so damaged by fire or any unavoidable casualty as to make the same uninhabitable, and
8 either party may forthwith terminate this lease by written notice to that effect.

Provided always, that if the rent aforesaid, or any installment thereof, shall not be paid within 3 days after the same becomes due and payable as aforesaid, although no demand shall have been made for the same; or if the lessee or his assigns shall fail or neglect to keep and perform each and every of the covenants, conditions, and agreements herein contained and on the part of the said lessee to be

kept and performed, or if the same or any of them shall be broken, then and in each and every such case from thenceforth and at all times thereafter, at the option of the lessor or his assigns, the lessee's right of possession shall thereupon end and determine, and the lessor or his assigns shall be entitled to the possession of said leased premises, and to reenter the same without demand of rent or demand of possession of the said premises, and may forthwith proceed to recover possession of the said leased premises by process of law, any notice to quit or of intention to exercise said option, or to re-enter the same being hereby expressly waived by the lessee and his assigns.

And in the event of such reentry by process of law, or otherwise, the lessee nevertheless covenants and agrees to remain answerable for any and all damages, deficiency or loss of rent which the lessor may sustain by such reentry; and the lessor reserves full power, which is hereby acceded to by the lessee, to re-let the said premises for the benefit of the lessee.

And the lessee expressly covenants and agrees to pay said rent as aforesaid, and also keep and perform each and every of the
9 covenants, conditions, and agreements herein contained.

It is mutually agreed that this lease shall bind the executors, administrators, heirs and assigns of the respective parties hereto.

And it is further agreed, that no waiver of any breach of any covenant, condition, or agreement herein shall operate as a waiver of the covenant, condition, or agreement itself, or any subsequent breach thereof.

In testimony whereof, The said parties have hereunto signed their names and affixed their seals the day and year first hereinbefore written.

JOHN T. KNOTT. [SEAL.]
JULIUS BLOCK. [SEAL.]

(Endorsed.)

Lease Agreement.

John T. Knott

to

Julius Block.

Premises, Store room, 919 F St. N. W.

Rent $2,580 per year—Payable $215 monthly, in advance.

Term 3 years, from Jan. 1, 1917, Commencing ——.

10 Nov. 13, 1919.

For value received I hereby assign and transfer to Shannon & Luchs all my right title & interest in and to the within contract.

JOHN T. KNOTT. [SEAL.]

Nov. 13, 1919.

For value received we hereby assign and transfer to Louis Hirsh all our right, title & interest in and to the within contract.

HERBERT T. SHANNON & [SEAL.]
MORTON J. LUCHS, [SEAL.]
Trading as Shannon & Luchs,
By MORTON J. LUCHS,
Member of Firm.

Summons in the Municipal Court.

* * * * * * *

The President of the United States to the defendant, Greeting:

You are hereby summoned to appear in this Court on the 17 day of Jan. A. D. 1920, at 10 o'clock A. M., to answer the plaintiff's complaint and show cause why judgment should not be given against you for the restitution of the possession of the premises described in the complaint, under oath, filed herein by said plaintiff, besides costs; and in case of your failure so to appear and answer, the suit will be proceeded with as in case of default.

Witness the Honorable Judges of said Court this Jan. 6, 1920.

BLANCHE NEFF,
Clerk,
By R. H. ROLLINS,
Assistant Clerk.

11 *Marshal's Return.*

January 7, 1920.

Summoned by leaving a copy hereof with a person above the age of sixteen years in possession of the premises; the defendant not to be found. Miss Hetman.

MAURICE SPLAIN,
U. S. Marshal,
By CALLAHAN,
Deputy Marshal.

Judgment in the Municipal Court.

January 20, 1920.

Judgment for defendant after motion to dismiss was overruled with costs.

R. H. TERRELL,
Judge.

Notice of Appeal in the Municipal Court.

* * * * * * *

To Julius Block,
919 F Street Northwest,
Washington, D. C.,
Defendant:

You are hereby notified that I, this 21st day of January, A. D., 1920, note an appeal from the judgment in the above entitled cause, and that I shall on the 24th day of January, A. D., 1920, at the hour of 10:00 A. M. in the Municipal Court of the District of Columbia, offer The Fidelity and Deposit Company of Maryland, a corporation, whose agent is B. Emmert Germann, Esquire, with offices in
12 The Riggs Building, 15th and G Streets, Northwest, as surety on the undertaking to be entered into herein.

LOUIS HIRSH,
Complainant.

Affidavit as to Service.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Richard D. Daniels being duly sworn deposes and states that he is one of the attorneys of record in the above entitled cause. That on the 21st day of January, A. D., 1920, he personally served at 12.08 P. M. a carbon copy of the attached notice of appeal in this action upon Julius Block, the defendant, at his place of business No. 919 F Street, Northwest, Washington, D. C. That said carbon copy was an exact copy of the appended original, and was signed by the complainant. That he made further service of said notice of appeal by leaving a second carbon copy of said notice, signed by said Louis Hirsh, complainant, with Theodore Peyser, Esquire, associated with Julius Peyser, Esquire, attorney of record for defendant, in the law offices of said Julius Peyser, Esq., Suite 208-212, Wilkins Building, Washington, D. C., having been first told by Mr. Theodore Peyser, that Mr. Julius Peyser was absent from the city.

RICHARD D. DANIELS.

13 Subscribed and sworn to before me this 21st day of January, A. D., 1920.

[SEAL.] KATHERINE A. BAKER,
Notary Public, D. C.

Undertaking on Appeal in the Municipal Court.

* * * * * * *

The plaintiff desiring to appeal from the judgment rendered against him in the above-entitled cause, on the 20th day of January

1920, to the Supreme Court of the District of Columbia and Fidelity and Deposit Co. of Md., his surety hereby appearing and submitting to the jurisdiction of the said Supreme Court, undertake, jointly and severally, to satisfy and pay whatever final judgment may be recovered in the said Court, against said Louis Hirsh, which judgment they agree may be entered against them jointly, or either of them separately in this case.

Given under our hands this 21st day of January 1920.

LOUIS HIRSH.
FIDELITY AND DEPOSIT
CO. OF MD. [SEAL.]
B. E. GERMANN,
Atty.-in-fact.

Approved January 21, 1920.
M. M. DOYLE,
Judge.

14 Jan. 21, 1920.

I hereby certify that the Fidelity and Deposit Company of Maryland, the Corporation surety hereon, is duly authorized by the Secretary of the Treasury to do business in the District of Columbia, and that Geo. H. Price, 209 Riggs Building, is the duly constituted process agent of said corporation.

BLANCHE NEFF,
Clerk, M. C., D. C.

Certificate of Municipal Court on Appeal.

* * * * * * *

Plaintiff's attorneys—M. Cohen,
W. A. Johnston and
R. D. Daniels.

Date.	Proceedings.
1920	
Jan. 6th.	Sworn complaint filed. Summons and copy issued returnable Jan. 17—10 A. M.
" 7th.	Summons returned "summoned by leaving a copy hereof with a person above the age of sixteen years in possession of the premises, the defendant not to be found."
" 17th.	Trial—witnesses sworn.
" 20th.	Judgment for defendant, after motion to dismiss was overruled, with costs.
" 21st.	Appeal, notice of, filed. Set for Jan. 24—10 A. M.
" "	Appeal, undertaking on, with Fidelity and Deposit Co. surety, approved and filed.
" 28th.	Appeal, record on and papers filed with Clerk of Supreme Court, D. C. and notice sent to plaintiff's attorneys.

This is to certify, that the foregoing is a true copy of the Docket Entries and of all the proceedings had before the said Court
15 in the above cause, and that the annexed documents are all the original papers filed in said cause.

Witness, the Honorable Judges of said Court this 28th day of January A. D. 1920.

BLANCHE NEFF,
Clerk.

Costs paid by Plaintiff, $3.85.

Summons on Appeal from Municipal Court.

Issued January 28, 1920.

* * * * * * *

The President of the United States to the Appellee, Greeting:

The appellant having docketed an appeal in the Supreme Court of the District of Columbia, from the judgment of the Municipal Court of the District of Columbia, therefore,

You are hereby summoned to appear in said Supreme Court, on or before the tenth day, exclusive of Sundays and legal holidays, after the service of this Writ on you, and show cause why the said Appellant should not have judgment against you therein.

Witness the Honorable Walter I. McCoy, Chief Justice of said Court, the 28 day of January, A. D. 1920.

[SEAL.]

J. R. YOUNG,
Clerk,
By ALF. G. BUHRMAN,
Assistant Clerk.

W. G. JOHNSON,
MYER COHEN,
Attorneys.

16 *Marshal's Return.*

Served copy of this summons on the Appellee within named, personally the 29 day of Jan., 1920.

MAURICE SPLAIN,
Marshal.

K.

Order for Appearance.

Filed February 2, 1920.

* * * * * * *

The Clerk of said Court will please enter our appearance as attorneys for the defendant-appellee.

JULIUS I. PEYSER,
GEORGE E. EDELIN,
Attorneys for Defendant-Appellee.

Order for Appearance.

Filed February 4, 1920.

* * * * * * *

The Clerk of said Court will please enter my appearance — Plaintiff.

RICHARD D. DANIELS,
Attorney for Appellant.

17 *Affidavit of Plaintiff Under Rule 19.*

Filed February 4, 1920.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Louis Hirsh, being first duly sworn, deposes and says: I am the plaintiff and appellant in the above entitled cause and was the claimant in the Municipal Court of the District of Columbia from the judgment of which the appeal herein was taken, and the grounds upon which I claim possession of the premises described in the complaint, namely, the cellar and first floor, except the stairway to second floor, of premises known and designated as Number 919 "F" Street, Northwest, in the City of Washington, District of Columbia, are as follows: That heretofore, on and prior to the first day of December, A. D., 1916, Mary A. Cushing and Isabella Varney were seized in fee simple and in lawful possession in their own right of lot numbered sixty-four (64) in the subdivision made by the President and Directors of Gonzaga College of lots in Square numbered three hundred and seventy-six (376) in the City of Washington, District of Columbia, as said subdivision is recorded in Liber 11, folio 44, of the records of the Surveyor's Office of the District of Columbia, on which said lot the said described premises Numbered 919 "F" Street, Northwest, in said City, then stood and now stand, and, being so seized, they authorized one John T. Knott, who was their agent in charge of said real estate, to lease the same, and the said John T. Knott did, on the said first day of December, A. D., 1916, lease the said first herein described premises, to-wit, the
18 said cellar and first floor, excepting the stairway to the second floor of premises Number 919 "F" Street, Northwest, to the defendant, Julius Block, trading as Whites, and the said John T. Knott and Julius Block signed and sealed a deed of lease, a full, true and correct copy whereof is hereto attached, marked Exhibit A, and made part of this affidavit, whereby the said premises were let and rented unto the said defendant Julius Block for the term of three years, commencing on the first day of January, A. D., 1917, and ending on the thirty-first day of December, A. D., 1919, and wherein the said defendant, Julius Block, agreed, among other

things, that he would, at the end of his tenancy, surrender the said leased premises, and that said lease should bind the executors, administrators, heirs and assigns of the respective parties to said lease. That said defendant, Julius Block entered into possession of said premises under said lease and paid the rent thereunder according to its terms, and so continued to do throughout the term in said lease demised. That on the 12th day of November, A. D., 1919, the said Mary A. Cushing and Isabella Varney sold, and by good and sufficient deed, executed, acknowledged and delivered, granted and conveyed in fee simple the said described real estate and all the improvements thereon, with covenant of Special Warranty, unto one Sylvan J. Luchs, and the said deed was duly filed for record on the 13th day of November, A. D., 1919, in the Office of the Recorder of Deeds for the District of Columbia. That on said 12th day of November, A. D., 1919, the said Sylvan J. Luchs by good and sufficient deed, executed, acknowledged and delivered, granted and conveyed
in fee simple, the said described real estate and all the im-
19 provements thereon to this affiant, and the said deed was duly filed for record on the 13th day of November, A. D., 1919, in the office of the Recorder of Deeds for the District of Columbia. That on the said 13th day of November, A. D., 1919, the said John T. Knott duly and in writing transferred and assigned the said hereinbefore mentioned agreement of lease of said premises to the co-partnership of Shannon and Luchs, and on the same day the said Shannon and Luchs, in writing, duly assigned and transferred the said agreement of lease unto Louis Hirsh, this affiant, and this affiant then authorized the said firm of Shannon and Luchs, as the agents of this affiant, to collect and receive from said defendant, Julius Block, the rent to accrue due for the month of December, A. D., 1919, under said agreement of lease, and on the third day of December, 1919, the said defendant, Julius Block, paid to said Shannon and Luchs the rent for the month of December, A. D., 1919, due under said lease. This affiant further states that said sale and conveyance of said real estate by said Mary A. Cushing and Isabella Varney to Sylvan J. Luchs, and the said sale and conveyance of said real estate by Sylvan J. Luchs to this complainant were actual and in good faith; that the said Sylvan J. Luchs acted in said matter as the agent of this affiant; that this affiant furnished the consideration for the said sales and conveyances; that he is a bona fide purchaser of the said real property for his own occupancy and requires and intends to occupy and to use the same himself for the conduct therein of the business of retail selling of men's furnishings and
similar merchandise. That the defendant's rights of pos-
20 session of said premises under said lease terminated by the terms of said lease, on the 31st day of December, A. D. 1919. That on December 15, 1919, this affiant notified said defendant, in writing, that affiant had purchased said premises and would require possession thereof at the expiration of said lease on December 31, 1919, and on January 2, A. D., 1920, the said Block tendered to this affiant two hundred and fifteen dollars ($215) as rent for the month of January, 1920, which this affiant refused to accept, and on said

second day of January, 1920, this affiant demanded possession of said premises from said Block, but said defendant Block failed and refused to surrender such possession and still detains possession of the said property. That on the 6th day of January, 1920, I filed in the said Municipal Court my complaint and on the 20th day of January, 1920, on the motion of said defendant, Julius Block, the said Court entered judgment against me and in favor of said defendant, whereupon I appealed to the Supreme Court of the District of Columbia; that said appeal was docketed in said Court on the 28th day of January, 1920 and a summons issued to the said defendant, and said summons was served upon the said defendant, personally, by the United States Marshal for this District on the 29th day of January, 1920.

LOUIS HIRSH.

Subscribed and sworn to before me this third day of February, 1920.

[SEAL.] KATHERINE A. BAKER.

21 Service of a copy of the foregoing affidavit and attached exhibit acknowledged this 4th day of February, 1920.

J. I. PEYSER,
G. E. EDELIN,
Attorneys for Julius Block,
By P. HERMAN.

Affidavit of Defendant.

Filed February 12, 1920.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Julius Block, being first duly sworn according to law, deposes and says: That he is the defendant in the above entitled cause, wherein Louis Hirsh is the plaintiff; that he has a good and meritorious defense to the claim of the said plaintiff, which is as follows: That on the first day of December 1916, he leased for a period of three years beginning the first day of January 1917, and ending the thirty-first day of December 1919, the ground floor and store-room of premises known as 919 F Street, Northwest, in the City of Washington, District of Columbia; that the agreed rental as stipulated was $2,580.00 each year, to be paid in monthly installments of $215.00. That on the fifteenth day of December 1919, the affiant received a notice bearing the date and year aforesaid, signed by the plaintiff advising affiant that the plaintiff was the purchaser of the aforesaid premises and demanding possession thereof on the thirty-first day of
22 December 1919. That under and by virtue of the District of Columbia Rents Act, (Public—No. 63—66th Congress) generally known as the Ball Bill, approved by the President of the United States on the twenty-second day of October 1919, he con-

tinued in possession and is now in possession of the aforesaid premises, and is informed that he has the legal right to remain in possession. That on the sixth day of January 1920, the said plaintiff filed a complaint in the Municipal Court, claiming the estate of the affiant had been terminated by the expiration of the tenancy, and that on the twentieth day of January 1920, on the affiant's motion, the Court entered a judgment in the affiant's favor; whereupon the said plaintiff appealed to the Supreme Court of the District of Columbia. That the affiant denies that his right to possession of the said premises under the said lease has been terminated by the terms of the said lease; that the affiant denies that the plaintiff has a right to possession of the said premises by reason of the termination of the tenancy under which the affiant holds possession; for that by virtue of the Ball Bill, hereinbefore quoted, the affiant, as lessee, under the said lease is protected by the continuance of the said lease and is entitled to remain in possession of the said premises, notwithstanding the expiration of the term fixed by the said lease; for that the plaintiff purchased the said premises and took conveyance thereof subject to the rights of the affiant under the Ball Bill, hereinbefore quoted. That a bona fide owner of rental property, to obtain possession thereof for bona fide occupancy by himself, is required to give a thirty day notice in writing containing a full and
23 correct statement of all the facts and circumstances upon which the claim is based, according to the Ball Bill, hereinbefore quoted, and served in the manner provided by section 1223 of the code of laws for the District of Columbia, approved the third day of May 1901. That the affiant has not been served with a notice of thirty days, made mandatory under the provisions of the Ball Bill, hereinbefore quoted, and the affiant should not be evicted or dispossessed, and affiant requests that judgment be rendered for defendant.

JULIUS BLOCK.

Subscribed and sworn to before me this seventh day of February 1920.

[SEAL.] PHILIP HERMAN,
Notary Public, D. C.

Motion for Judgment.

Filed February 13, 1920.

* * * * * * *

Now comes the plaintiff and appellant, Louis Hirsh, by his counsel and moves the Court to enter judgment herein against the defendant and appellee for possession of the property described in the complaint and for costs. And for grounds for said motion shows:

1. That the affidavit of defense filed by the said defendant and appellee states no facts, which, if true, are sufficient to defeat plaintiff's right of recovery.

2. That the provisions of the Act of Congress approved
24 October 22, 1919, being Public No. 63 of the 66th Congress generally known as the Ball Act, relied upon by defendant and appellant are unconstitutional and void.

MYER COHEN.
WILLIAM G. JOHNSON.
RICHARD D. DANIELS.

To Messrs. Julius I. Peyser and George E. Edelin, Attorneys for Defendant and Appellee.

GENTLEMEN:

Please take notice that on Friday, February 20, 1920, at ten a. m. we will call up the above motion for action by the Court.

MYER COHEN.
WM. G. JOHNSON.
RICHARD D. DANIELS.
Counsel for Plaintiff and Appellant.

Service of a copy of above motion acknowledged this 13th day of February, A. D. 1920.

J. I. PEYSER.

25 Supreme Court of the District of Columbia.

Friday, February 20th, 1920.

Session resumed pursuant to adjournment, Hon. F. L. Siddons, Justice presiding.

* * * * * * *

Come now the parties hereto by their respective attorneys of record; whereupon, plaintiff's motion for judgment is submitted to the Court and being considered by the Court, is overruled and judgment for the defendant is ordered.

Wherefore, it is considered that the plaintiff take nothing by this action, that the defendant go hence without day, be for nothing held and recover of the plaintiff and Fidelity & Deposit Co. of Md., his surety, the costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing, the plaintiff by his attorney of record, Mr. Wm. G. Johnson, in open court, notes an appeal to the Court of Appeals; whereupon the penalty of a bond for costs is fixed in the sum of One Hundred Dollars ($100.00) with leave to deposit the sum of Fifty Dollars ($50.00) with the clerk, in lieu thereof.

26 *Mandate from Court of Appeals.*

Filed July 21, 1920.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the District of Columbia, Greeting:

[SEAL.]

Whereas, lately in the Supreme Court of the District of Columbia, before you, or some of you, in a cause between Louis Hirsh, complainant, and Julius Block, trading and carrying on business under the name and style of Whites, defendant, Law No. 63304, wherein the judgment of the said Supreme Court entered in said cause on the 20th day of February, A. D. 1920, is in the following words, viz:

Come now the parties hereto by their respective attorneys of record; whereupon, plaintiff's motion for judgment is submitted, to the Court and being considered by the Court, is overruled and judgment for the defendant is ordered.

Wherefore, it is considered that the plaintiff take nothing by this action, that the defendant go hence without day, be for nothing held and recover of the plaintiff and Fidelity & Deposit Co. of Md., his surety, the costs of defense to be taxed by the clerk and have execution thereof.

From the foregoing, the plaintiff by his attorney of record Mr. Wm. G. Johnson, in open court, notes an appeal to the Court

27 of Appeals; whereupon the penalty of a bond for costs is fixed in the sum of One Hundred Dollars ($100.00) with leave to deposit the sum of Fifty Dollars ($50.00) with the clerk, in lieu thereof.

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of April, in the year of our Lord one thousand nine hundred and twenty, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs; and that the said complainant Louis Hirsh, recover against the said defendant, Forty-six dollars and forty cents for his costs herein expended and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

June 2, 1920.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and judgment of this Court as according to right and
28 justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Constantine J. Smyth, Chief Justice of said Court of Appeals, the 21st day of July in the year of our Lord one thousand nine hundred and twenty.

Costs of Complainant.

Clerk	$11.40
Attorney	$5.00
Printing Record	$30.00
	$46.40

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Motion.

Filed July 26, 1920.

* * * * * * *

Comes now the defendant-appellee, by his attorneys, and moves that he be permitted to file the additional and supplemental affidavit of defense attached hereto.

JULIUS I. PEYSER,
JESSE C. ADKINS,
Attorneys for Defendant-Appellee.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Julius Block, being first duly sworn according to law, deposes and says: That he is the defendant in the above entitled cause, wherein Louis Hirsh is the plaintiff; that he has a good and meritorious defense to the claim of the said plaintiff, which is as
29 follows: That on the first day of December, 1916, he leased for a period of three years beginning the first day of January, 1917, and ending the thirty-first day of December, 1919, the ground floor and store-room of premises known as 919 F Street, Northwest, in the City of Washington, District of Columbia; that the agreed rental as stipulated was Two Thousand Five Hundred and Eighty ($2,580) Dollars each year, to be paid in monthly installments of Two Hun-

dred and Fifteen ($245,000) Dollars. That on the fifteenth day of December, 1919, the affiant received a notice bearing the date and year aforesaid, signed by the plaintiff advising affiant that the plaintiff was the purchaser of the aforesaid premises and demanding possession thereof on the thirty-first day of December, 1919. That under and by virtue of the District of Columbia Rents Act (Public No. 63—66th Congress) generally known as the Ball Bill, approved by the President of the United States on the twenty-second day of October, 1919, he continued in possession and is now in possession of the aforesaid premises, and is informed that he has the legal right to remain in possession. That on the sixth day of January, 1920, the said plaintiff filed a complaint in the Municipal Court, claiming the estate of the affiant had been termined by the expiration of the tenancy and that on the twentieth day of January, 1920, on the affiant's motion, the Court entered a judgment in the affiant's favor; whereupon the said plaintiff appealed to the Supreme Court of the District of Columbia. That the affiant denies that his right to possession of the said premises under the said lease has been terminated by the terms of the said lease; that the affiant denies that
30 the plaintiff has a right to possession of the said premises by reason of the termination of the tenancy under which the affiant holds possession; for that by virtue of the Ball Bill, hereinbefore quoted, the affiant, as lessee, under the said lease is protected by the continuance of the said lease and is entitled to remain in possession of the said premises, notwithstanding the expiration of the term fixed by the said lease; for that the plaintiff purchased the said premises and took conveyance thereof subject to the rights of the affiant under the Ball Bill, hereinbefore quoted. That a bona fide owner of rental property, to obtain possession thereof for bona fide occupancy by himself, is required to give a thirty day notice in writing containing a full and correct statement of all the facts and circumstances upon which the claim is based, according to the Ball Bill, hereinbefore quoted, and served in the manner provided by section 1223 of the Code of Laws for the District of Columbia, approved the third day of May, 1901. That the affiant has not been served with a notice of thirty days, made mandatory under the provisions of the Ball Bill, hereinbefore quoted; that the property in controversy is and always has been rental property within the meaning of the Ball Bill; that it has never been used as an office, business place of business by the owners, but affiant is informed, believes and, therefore, avers that same has always been used in the business of renting; that the upper floors of said premises have been rented to and occupied by the present tenant, F. William Ernst, for about twenty years as a photograph gallery; that the affiant has been a tenant of the first floor of the said premises since to wit: Jan-
31 uary, 1917; that for about two years prior to the time affiant's tenancy began to run the said first floor was unoccupied; that prior to the time the said premises were unoccupied as heretofore set forth, the said first floor was rented to and occupied by one Josephson, a dealer in rubber goods, who was a tenant in the said premises for about two or three years; that prior to the tenancy of

the said Josephson, the said first floor was occupied by a tenant engaged in the business of running a cafeteria, the tiling and other indications of such use, still existing on the premises; that affiant is informed, believes and, therefore, avers that prior to the use by the tenant of said premises as a cafeteria, the premises were occupied by divers persons as tenants running back to the time the said building was erected; that affiant is informed, believes and, therefore, avers that since the institution of the present action the said Hirsh has placed the premises in controversy in the hands of a real estate agent for the express purpose of selling the same at a profit if possible so to do; that on to wit: the 8th day of July, affiant was approached by one J. H. Keane, a real estate broker, having offices in the Colorado Building, who claimed to be the duly authorized agent for and in behalf of the said Hirsh in the sale of the said premises in controversy; that the said Keane offered in behalf of the said Hirsh to sell the premises in controversy to affiant, but affiant refused to purchase the same, being unable to expend the large amount of money necessary to complete the purchase; that by reason of the foregoing the affiant states that the present demand for possession of the said premises is not made in good faith within the meaning of the Roll Bill because the plaintiff does not require the premises in
32 controversy for his own use and occupancy, but to the contrary has no need or intention of moving his business, and merely wishes possession of the premises in controversy for the sole and only reason of reselling the same at a profit, and which it is easier to do if the building is sold empty of tenants; that, therefore, affiant should not be evicted or dispossessed.

JULIUS BLOCK.

Sworn to and subscribed before me this 24th day of July, 1920.
[SEAL.] PHILIP HERMAN,
Notary Public, D. C.

Memorandum.

July 27, 1920.—Supersedeas bond $7,500 approved and filed.

Supreme Court of the District of Columbia.

Wednesday, July 28, 1920.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

Now come again here the parties hereto by their respective attorneys of record, and the Mandate of the Court of Appeals of the District of Columbia, issued by said Court of Appeals on the
33 appeal to it from the former judgment, rendered herein on February 20, 1920, being shown to the Court here, and the plaintiff, by his attorney of record, moving for judgment herein, in

pursuance of and obedience to said Mandate, it is, by the Court, considered that the judgment of this Court entered herein on February 20, 1920, be and the same is hereby vacated, set aside and for naught held, and it is further considered that the plaintiff and appellant herein, Louis Hirsh, do have and recover from the defendant and appellee, Julius Block, possession of the real estate described in the plaintiff's complaint in the Municipal Court of the District of Columbia, reinstituted to this Court on his appeal from the judgment thereof; to wit, the cellar and first floor, excepting the stairway to the second floor of premises Number 919 F Street, Northwest, located in the District of Columbia, and that said plaintiff and appellant do recover from the said defendant and appellee his costs in this Court, to be taxed by the Clerk and in the Court of Appeals, as taxed on said Mandate, and have execution therefor.

The said Julius Block by his Attorney having, in open Court, noted an appeal to the Court of Appeals from the foregoing judgment, the Court now here orders that the penalty of a bond on said appeal to operate as a supersedeas be, and the same is fixed at the sum of Seven thousand, five hundred dollars ($7,500.00), and a bond as security for costs only, at the sum of Fifty dollars ($50.00) and the defendant may deposit in the Registry of the Court as security for costs only on said appeal, the sum of Fifty dollars ($50.00) in cash, in lieu of a bond.

34 Thursday, July 29, 1920.

Session resumed pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

It is by the Court ordered that the approval of a Supersedeas bond in the sum of Seven thousand, five hundred dollars ($7,500) in this cause on July 27, 1920, be, and the same is hereby vacated and set aside, with leave to defendant to file instanter a Supersedeas bond in said penalty.

Memorandum.

July 29, 1920.—Supersedeas bond $7,500 approved and filed.

Assignment of Errors.

Filed July 30, 1920.

* * * * * * *

The Court erred as follows in rendering judgment in the above entitled cause:

1. The Court erred in holding the Ball Rent Act, Public No. 63, 66th Congress, approved October 22, 1919, unconstitutional.

2. The Court erred in holding that the business of renting real estate in the District of Columbia is not affected with the public use.

3. The Court erred in holding that the business of renting
35 real estate in the District of Columbia is a private business.

4. The Court erred in holding that regulation of the business of renting real estate in the District of Columbia by Congress was not a legitimate exercise of its police power.

5. The Court erred in holding that the determination of whether or not a business is affected with the public use is a judicial function.

6. The Court erred in holding that the determination of whether or not a business is affected with the public use is not a legislative function.

7. The Court erred in holding that the Ball Rent Act destroys the right to a trial by jury in a suit for the recovery of possession of real estate in the District of Columbia.

8. The Court erred in holding that the Ball Rent Act violates the due process clause of the Fifth Amendment of the Constitution.

9. The Court erred in holding that the plaintiff was so affected and prejudiced by the application of the Ball Rent Act that it could attack its constitutionality.

10. The Court erred in not holding the Ball Rent Act constitutional and valid.

11. The Court erred in overruling the defendant's motion to file a supplemental affidavit of defense.

JULIUS I. PEYSER,
JESSE C. ADKINS,
GEORGE E. EDELIN,
Attorneys for Defendant-Appellant.

36 *Designation of Record.*

Filed July 30, 1920.

* * * * * * *

The clerk will please prepare the transcript of record on appeal herein and include therein the following papers:

The entire record.

JULIUS I. PEYSER,
JESSE C. ADKINS,
GEORGE E. EDELIN,
Attorneys for Defendant-Appellant.

37 **Supreme Court of the District of Columbia.**

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Morgan H. Beach, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 36, both inclusive, to be a true and correct transcript of the

record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 63304 at Law, wherein Louis Hirsh is Plaintiff and Julius Block, trading and carrying on business under the name and style of Whites is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 9th day of August, 1920.

[Seal Supreme Court of the District of Columbia.]

MORGAN H. BEACH,
Clerk.

E. W.

Endorsed on cover: District of Columbia, Supreme Court. No. 3454. Julius Block, &c., appellant, vs. Louis Hirsh. Court of Appeals, District of Columbia. Filed Sep. 9, 1920. Henry W. Hodges, clerk.

In the Court of Appeals of the District of Columbia, October Term, 1920.

No. 3454.

JULIUS BLOCK, Appellant,

vs.

LOUIS HIRSH, Appellee.

Motion to Advance.

Now comes the appellee, Louis Hirsh, by his counsel and moves the Court to advance this cause for hearing, and shows:

1. That the record and briefs on both sides are printed and the case stands ready for hearing.

2. That the case is here upon the same record as when heard and decided by this Court at April Term, plus the proceedings in pursuance of the mandate of this Court on the former appeal.

3. That the appellant herein in his brief relies solely upon the claimed constitutionality of the District of Columbia Rents Act, adjudged by this Court to be unconstitutional, so that the only question presented by this second appeal is the same one decided on the first appeal, and this appeal is only formal, leading to a review by the Supreme Court of the United States.

4. That prompt hearing of this case and the rendition of a final judgment herein, to the end that a review thereof may be had by the Supreme Court of the United States at the earliest moment, are of great public importance, because of the large numbers of cases arising daily out of landlord and tenant relations.

Respectfully submitted.

MYER COHEN.
RICHARD D. DANIEL.
WM. G. JOHNSON.

Endorsed: No. 3454. Julius Block vs. Louis Hirsh. Motion to Advance. Court of Appeals, District of Columbia. Filed November 13, 1920. Henry W. Hodges, Clerk.

Monday, November 15th, A. D. 1920.

No. 3454.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of Whites, Appellant,

vs.

LOUIS HIRSH.

On consideration of the motion to advance and submit in the above entitled cause, submitted by Mr. J. C. Adkins, of counsel for

the appellant, It is by the Court this day ordered that said motion be and the same is hereby granted.

No. 3454, October Term, 1920.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of Whites, Appellant,

vs.

LOUIS HIRSH.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per CURIAM.
November 15, 1920.

Mr. Chief Justice Smyth dissenting.

In the Court of Appeals of the District of Columbia.

No. 3454.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of Whites, Appellant,

vs.

LOUIS HIRSH.

Opinion.

Opinion Per Curiam:

For the reasons stated in our opinion in the case of Block vs. Hirsh, No. 3372, the judgment in this case is affirmed with costs.

In the Court of Appeals of the District of Columbia.

No. 3454.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of Whites, Appellant,

vs.

LOUIS HIRSH.

Dissenting opinion per Mr. Chief Justice SMYTH:

I dissent for the reasons expressed in my opinion when this case was here before, and adopt that opinion as my opinion in this case.

Tuesday, May 4th, A. D. 1920.

No. 3372.

LOUIS HIRSH, Appellant,

vs.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of Whites.

The argument in the above entitled cause was commenced by Mr. Wm. G. Johnson, attorney for the appellant, and was continued by Mr. Julius L. Peyser, attorney for the appellee, and was concluded by Mr. Wm. G. Johnson, attorney for the appellant.

In the Court of Appeals of the District of Columbia.

No. 3372.

LOUIS HIRSH, Appellant,

vs.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of Whites, Appellee.

Opinion.

Opinion of the Court per Mr. Justice Van Orsdel.

This is a landlord and tenant proceeding brought by appellant Hirsh, plaintiff below, in the Municipal Court of the District of Columbia to recover possession of certain premises held by defendant Block under a three-years' lease, which terminated on the 31st day of December, 1919.

It appears that, on November 12, 1919, the owners of the reversion, Mary A. Cushing and Isabella Varney, conveyed the property in question by deed to one Sylvan J. Luchs, who, on the same day, conveyed it in fee simple to plaintiff Hirsh. The lease was duly assigned to plaintiff. Plaintiff authorized his agents to collect from the defendant the rent accruing to the termination of the lease—the 31st day of December, 1919—which rent was paid.

On December 15, 1919, plaintiff notified defendant that he had purchased the property and would require possession at the expiration of the lease. Defendant refused to vacate; hence, this proceeding.

From a judgment in favor of defendant in the Municipal Court, plaintiff appealed to the Supreme Court of the District of Columbia, where he filed an affidavit of merit under Rule 19, in which he set forth, among other things, "that he is a bona fide purchaser of the

said real property for his own occupancy and requires and intends to occupy and to use the same himself for the conduct therein of the business of retail selling of men's furnishings and similar merchandise." An affidavit of defense was filed by defendant, in which he denied plaintiff's right to possession of the premises by reason of the termination of the lease, claiming that under the Ball Rent Law the lease is continued in force and he is entitled to remain in possession of the premises notwithstanding the expiration of the term fixed by the lease, and alleged that plaintiff purchased the premises and took conveyance thereof subject to the rights of the defendant under the act. It is further averred that plaintiff is required by the act to give a thirty-day notice in writing, served in the manner provided by section 1223 of the District Code, which notice has not been served, though it is made mandatory under the provisions of the act.

On hearing, the court denied the motion of plaintiff for judgment, and entered judgment in favor of defendant, from which this appeal is prosecuted.

This case involves the constitutionality of the act of Congress of October 22, 1919, (41 Stats. L., 298), known as the "Ball Rent Law." The act provides for the appointment of a rent commission consisting of three persons who are vested with absolute jurisdiction over landlords and tenants, the fixing of rents, and the continuing and making of leases within the District of Columbia for a period of two years, unless the act is sooner repealed by Congress. The only check upon the power of the commission is a restricted right of appeal to the Court of Appeals of the District of Columbia, in which "the commission's determination shall not be modified or set aside by the court, except for error of law." The act provides that the appeal shall in no manner operate as a supersedeas or stay to postpone the enforcement of the determination of the commission appealed from, and, if any finding of the commission is modified as the result of the appeal or set aside, the difference between the amount of rent paid pending appeal and the amount which should have been paid under the final judgment in the case may be recovered by suit in the Municipal Court of the District of Columbia.

The act declares rental property, hotels and apartments "affected with a public interest, and that all rents * * * shall be fair and reasonable; and any unreasonable or unfair provision of a lease * * * is hereby declared to be contrary to public policy." The commission, on complaint of either the landlord or tenant, or on its own motion is empowered to inquire into and determine whether the terms and conditions of any lease are fair and reasonable, provided, however, that the landlord cannot make complaint when the tenant is in possession under an unexpired lease. On hearing, if the commission finds that the rent or terms of the lease are unreasonable or unfair, it shall determine and fix a "fair and reasonable rent or charges therefor, and fair and reasonable service, terms, and conditions of use or occupancy. In any suit in any court of the United States or the District of Columbia involving any question arising out of the relation of landlord and

tenant with respect to any rental property, apartment, or hotel, except on appeal from the commission's determination as provided in this title, such court shall determine the rights and duties of the parties in accordance with the determination and regulations of the commission relevant thereto."

The act also provides that "the rights of a tenant to the use or occupancy of any rental property, hotel or apartment, existing at the time this act takes effect, or thereafter acquired, under any lease or other contract for such use or occupancy or under any extension thereof by operation of law, shall, notwithstanding the expiration of the term fixed by such lease or contract, continue at the option of the tenant subject, however, to any determination or regulation of the commission relevant thereto; and such tenant shall not be evicted or dispossessed so long as he pays the rent and performs the other terms and conditions of the tenancy as fixed by such lease or contract, or in case such lease or contract is modified by any determination or regulation of the commission, then as fixed by such modified lease or contract. All remedies of the owner at law or equity, based on any provision of any such lease or contract to the effect that such lease or contract shall be determined or forfeited if the premises are sold, are hereby suspended so long as this title is in force. Every purchaser shall take conveyance of any rental property, hotel, or apartment subject to the rights of tenants as provided in this title."

The act then provides that the bona fide owner of rental property shall have the right of possession for his own use and occupancy upon giving thirty-days' notice as provided in Section 1223 of the District Code, which notice shall contain a statement of the facts upon which it is based. In case there is a dispute between the landlord and tenant as to the accuracy or sufficiency of the statement, the matters in dispute shall, upon complaint, be determined by the commission.

The act vests the commission with power to subpœna and compel the attendance of witnesses and the production of records, to fix rental rates retroactively to take effect from the date of filing the complaint, to prescribe the procedure to be followed in all proceedings under its jurisdiction, and to prescribe standard forms of leases and contracts to be used in renting property, with the provision that any lease or contract made after the form has been prescribed, regardless of its provisions, shall be interpreted, applied and enforced by the commission or any court of the United States or the District of Columbia "in the same manner as if it were in the form and contained the stipulations of such standard form."

Heavy penalties are prescribed for the collection of rent in excess of the amount fixed by the commission or for the collection of any bonus or other consideration in addition to the fixed rental; and the assignment of leases or subletting of leased premises at a greater rental than that paid under the lease is forbidden, except by permission of the commission.

The right of plaintiff to question the constitutionality of the act in this proceeding is assailed. It is urged that he should have pur-

sued the remedy prescribed in the act, and, if unsuccessful, appeal. But plaintiff would be in poor position to question the jurisdiction which he had himself invoked merely because of an adverse decision. If he should invoke the aid of the statute and suffer defeat before the commission, he would estop himself to seek further relief on the ground of the unconstitutionality of the act. He would not be permitted to thus experiment with the law. Electric Co. vs. Dow, 166 U. S., 489; Wight vs. Davidson, 181 U. S., 371; Shepard vs. Barron, 194 U. S., 553; Daniels vs. Tearney, 102 U. S., 415; Grand Rapids, etc., Ry. Co. vs. Osborn, 195 U. S., 17. The sole defense interposed is the present act. If it is valid, the defense is complete, since the thirty-day notice required by the act was not given, and the proceedings could only be had before the commission. If the act is void, it furnishes no defense; since, under existing law, at the expiration of a time lease no notice is required, and the proceedings to acquire possession must be brought, as in this case, in the Municipal Court of the District. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Norton vs. Shelby County, 118 U. S., 425, 442.

Coming to the validity of the act, we have held in the recent case of Willson vs. McDonnell, — App. D. C., —; — Fed., —, considering an act of Congress similar to the one before us, that the provisions of the Constitution which protect persons and property are uniform in their operation throughout the United States. In this respect, there is no distinction between the District of Columbia and the States of the Union. "There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property." Callan vs. Wilson, 127 U. S., 540, 550.

But what are the rights of which plaintiff has been divested if the present act is held to constitute a valid defense to his action for possession? Plaintiff had a vested estate and reversion in fee in the property in question to come into possession on January 1, 1920. Defendant's right of possession terminated on December 31, 1919, by the express terms of his lease, a contract valid and existing when this this act was passed. This right of reversion is a property right, of which plaintiff cannot be divested except by due process of law. The act gives defendant the option of retaining possession of the property at the rental fixed in the lease, which is continued in force; or, if dissatisfied, he may apply to the commission for a reduction of the rent. If reduced by the commission, plaintiff is powerless to have a review of the facts upon which the action of the commission is based. Not only is plaintiff denied any remedy for this continued detention of his property, but he is forbiden to sell his property except subject to and burdened by the option of the tenant. It would seem, therefore, that if the property clauses of the Constitution are longer to have any restrain-

ing power over Congress, the case here presented is one within the inhibition of the Fifth Amendment.

Nor does this amount to the taking of private property for public use. Plaintiff and defendant are private citizens engaged in private business. If the Government needed the use of this property for the better conduct of the war, it had a remedy, plain and adequate, by the exercise of the power of eminent domain. But, as was said by Mr. Justice Story, speaking for the court in Wilkinson vs. Leland, 2 Pet., 627, 658: "We know of no case, in which a legislative act to transfer the property of A. to B., without his consent, has ever been held a constitutional exercise of legislative power, in any state in the Union. On the contrary, it has been consistently resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced."

The power to fix rental rates between private individuals is not analogous to nor controlled by the decisions which have upheld the power of the legislature to fix rates for service where the owner has devoted the business affected to a public use. In Munn vs. Illinois, 94 U. S., 113, the owner of the grain elevator had for years devoted it to a public use in handling grain for the public generally. The court, upholding the power of the legislature of Illinois to fix rates for the service thus rendered the public, announced the rule authorizing this exercise of legislative power, as follows: "To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives new effect to an old one."

The same principle runs through the Railroad Rate Cases; the Insurance case (German Alliance Ins. Co. vs. Lewis, 233 U. S., 389); the Bank Guaranty Decision (Noble State Bank vs. Haskell, 219 U. S., 104); the Irrigation Cases (Clark vs. Nash, 198 U. S., 361, and Strickley vs. Highland Boy Mining Co., 200 U. S., 527); the Wharf Case (Weems Steamboat Co. vs. People's Steamboat Co., 214 U. S., 345), and the Pipe Line Case (Producers' Transp. Co. vs. Railroad Commission, 251 U. S., 228).

In no case where the legislative power to regulate and fix rates has been upheld has the power to continue existing contracts in force after the time fixed by the parties for their termination, or to require the owner of the property to continue the business, been sustained. In the Noble Bank Case, supra, the court held, on petition for rehearing (219 U. S., 575), that, if the law was obnoxious to any one engaged in the banking business, "the payment can be avoided by going out of the banking business, and is required only as a condition of keeping on, from corporations created by the State." But in the present case, the landlord is not only prevented from going out of the renting business, but is required to continue it upon the terms fixed by the act.

The renting of property in the District of Columbia is a private business, whether the tenant be an employee of the Government or not. A private business cannot be made public or impressed with

a public interest merely by legislative fiat. A public interest cannot be thus created, or property rights be divested, by an arbitrary exercise of the police power. In both instances, the power resides in the judiciary to restrain the law-making power with constitutional limitations. In the Producers' Transportation Case, Mr. Justice Van Devanter, speaking for the court, said: "It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts and never was devoted by its owner to public use, that is, to carrying for the public, the State could not by mere legislative fiat or by an regulating order of a commission convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no State can do consistently with the due process of law clause of the Fourteenth Amendment."

More potent still, as affecting the constitutionality of the present act, is the fact that landlords and tenants in the District of Columbia are, by its express terms, deprived of the right of trial by jury in cases involving the right to possession of real estate. Though a writ undoubtedly may be obtained in the Municipal Court upon the determination of the rent commission that the owner is entitled to possession, the finding of fact by the commission is binding and conclusive upon the court and the parties, which, of course, forecloses the intervention of a jury. In Whitehead vs. Shattuck, 138 U. S., 146, 151, the court holding that the action for the recovery of possession of real estate is at law, and not by suit in equity, said: "The Seventh Amendment of the Constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' * * * The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

Section 122 of the act provides as follows: "It is hereby declared that the provisions of this title are made necessary by emergencies growing out of the war with the Imperial German Government, resulting in rental conditions in the District of Columbia dangerous to the public health and burdensome to public officers and employees whose duties require them to reside within the District and other persons whose activities are essential to the maintenance and comfort of such officers and employees, and thereby embarrassing the Federal Government in the transaction of public business. It is also declared that this title shall be considered temporary legislation, and that it shall terminate on the expiration of two years from the date of the passage of this Act, unless sooner repealed."

A similar statement was contained in the Saulsbury Resolution (40 Stats. L., 593.) In the Willson case, holding the resolution void we said: "The Constitution is not superseded by a declaration of war, and experience has demonstrated that ample provision may be

made for 'the national security and defense' without overstepping its limitations." And Mr. Justice Brandeis, in the recent case of Hamilton vs. Kentucky Distilleries & Warehouse Co., 251 U. S., 146, said: "The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations."

The declaration here amounts merely to a statement of the inducement or reason for the enactment of the statute. It affects no change in the method of acquiring private property for public use. It adds nothing to the constitutional power of Congress. The only exception to the rule that, in the case of "war emergency," private property must be taken under the power of eminent domain, is where private property may be impressed into the public service, or seized for a public use, by a military officer in the field, either to prevent it from falling into the hands of the public enemy, or for the use of the army to meet an immediate and pressing necessity. But this is taking for public use, and not for private use. Such action, however, is only justified where the emergency is too great to admit of delay to await the sanction of the civil authorities. In all such cases, the Government is bound to make full compensation Mitchell vs. Harmony, 13 How., 115.

Nor can Congress, by a mere legislative declaration, convert a private use into a public use; nor, by such a declaration, create an arbitrary exercise of the police power, or make an act constitutional which otherwise would be unconstitutional. Undoubtedly, in the exercise of the power of eminent domain, Congress has the power to designate the public use for which private property may be taken, and, if found by the courts to be, in fact, a public use, the courts are then powerless to question the wisdom of the legislative decision. "The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted; that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made." Shoemaker vs. United States, 147 U. S., 282, 298.

And the courts are not estopped by any legislative declaration from inquiring into the nature of the use to determine whether it is, in fact, public or private. "The nature of the use for which land is to be taken necessarily appears on the face of the proceeding; and, if it is not a public one, the condemnation cannot be sustained, no matter what the legislature may have declared." Coe vs. Aiken, 61 Fed., 24, 32.

In Palaire's Appeal, 67 Pa. St., 479, the court considered an act of the legislature of Pennsylvania in which it was attempted to extinguish irredeemable rents. The act provided for just compensation to be fixed by a jury, and, as here, contained a declaration of public use as a matter of public policy. Mr. Justice Sharswood, in an able opinion, declaring the act unconstitutional, said: "No doubt the right of *eminent domain*, being for the safety and advantage of

the public, overrides all rights of private property. But for what public use has this estate of the appellants been taken and applied? It has been contended, as the preamble of the act declares, that 'the policy of this Commonwealth has always been to encourage the free transmission of real estate, and to remove restrictions on alienation, so that it is, and is hereby declared to be, necessary for the public use to provide a method of extinguishing such irredeemable rents, having a due regard for private rights.' But if this is the kind of public use for which a man's property can be taken, there is practically no limit to the legislative power. It would result that whenever the legislature deem it expedient to transfer one man's property to another upon a valuation, they can effect their object."

In other words, whatever power Congress may possess to take private property for a public use upon just compensation, it has no power, under any circumstances, to take private property for a private use, as is attempted under the present act. Here, however, the individual litigant invokes the aid of the statute, not for the public use, but for his own private benefit. Though Congress may have had power, in the exercise of the right of eminent domain as a war emergency to take over rental property in the District of Columbia to devote it to the public use of accommodating its employees and officials, it has not power to take the private property of one individual and turn it over to the use of another private individual. As we said in the Willson case: "In the present case, for example, by the exercise of the power of eminent domain, the Government might have checked and thwarted any tendency on the part of landlords toward extortion, and, at the same time, have satisfied the due process clause of the Constitution."

The judgment is reversed with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and *remanded*.

In the Court of Appeals of the District of Columbia.

No. 3372.

Louis Hirsh, Appellant.

vs.

Julius Block, Trading and Carrying on Business under the Name and Style of Whites.

Dissenting Opinion by Chief Justice Smyth.

Being unable to unite with my associates in the conclusion which they have reached in this case, I think it proper to state as briefly as may be the reasons for my position.

First. Block's lease of the property expired December 31, 1919. Hirsh became the owner of the property November 12, 1919; therefore in ample time to give Block thirty days' notice, as prescribed by the Ball Act, before his term expired. Hirsh brought his action

for possession in the municipal court, saying, in the words of the record, "that he is a bona fide purchaser of the said real property for his own occupancy and requires and intends to occupy and to use the same himself." Judgment went against him. He appealed to the supreme court of the District, and in his affidavit of merit repeated the allegation just quoted. Under Rule 19 of that court he filed a motion for judgment on the ground that the affidavit of defence filed by Block was insufficient. The motion was overruled and judgment given for the defendant.

The Ball Act provides: "the rights of the tenant under this title shall be subject to the limitation that the bona fide owner of any rental property, apartment, or hotel shall have the right to possession thereof for actual and bona fide occupancy by himself, or his wife, children, or dependents, upon giving thirty days' notice in writing, served in the manner provided by section 1223 of the Act entitled 'An act to establish a code of laws for the District of Columbia,' approved May 3, 1901, as amended, which notice shall contain a full and correct statement of the facts and circumstances upon which the same is based," etc. Therefore, if Hirsh's allegation with respect to being a bona fide purchaser of the property for his own use is true, he would be awarded possession under the act by the commission, for we must assume that it would correctly decide the case. Shreveport v. Cole, 129 U. S. 36, 42; Strother v. Lucas, 12 Pet. 410; Bobey v. Griswold, 20 Wall. 486, 488; Butler v. Maples, 9 Wall. 766. Should the tenant refuse to yield possession, Hirsh could apply to the municipal court for the proper writ, and the commission's determination under section 106 of the act would be conclusive of the "rights and duties" of the tenant, and a writ for possession would necessarily follow. Therefore, if he had pursued the course outlined in the act, he would have received complete relief, provided he gave the required thirty days' notice. According to the law existing prior to the approval of the act he would not have been required to give such notice. Does this render the act unconstitutional?

The requirement with respect to the notice affects the remedy only. It does not touch the contractual rights of the parties. There is a wide difference between the obligation of a contract and the remedy for its enforcement. This has been the law at least since Sturges v. Crowninshield, 4 Wheat. 122. In that case Chief Justice Marshall said: "The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of a contract, the remedy may certainly be modified as the wisdom of the nation shall direct." In a later case the same court said: "But it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract if an adequate and efficacious remedy is left." Antoni v. Greenhow, 107 U. S. 769, 774. To the same effect are Tennessee v. Sneed, 96 U. S. 69, 74; Wilson v. Standefer, 184 U. S. 399, 416; Waggoner v. Flack, 188 U. S. 595, 604; and Aikens v. Kingsbury, 247 U. S. 484, 488. According to the judgment of Congress the remedy in

the case before us was modified, but that was legitimate and did not make the act invalid.

It is asserted by Hirsh, and in effect repeated in the majority opinion, that the law secured him the unrestricted right of alienation of his property, the right to confer upon his alienee the right of possession without any claim or charge upon it, the right to relet the property to another tenant upon such terms as may be agreeable to him, without let or hindrance from Block, and that the act deprives him of these rights. The ready answer to these contentions is that he does not seek by his pleading the right to sell or relet his property. He asks only that he be given possession of it for his own occupancy and, as I have just pointed out, the act furnishes him a direct and effective means by which to get it. It will be time enough to adjudicate the other rights when they properly arise. Of a situation quite similar to the one we are considering, the Supreme Court of the United States said: "This is an effort to test the constitutionality of the law without showing that the plaintiff had been injured by its application, and in this particular the case falls within our ruling in Tyler v. Judges of Registration, 179 U. S. 405, wherein we held that the plaintiff was bound to show he had personally suffered an injury before he could institute a bill for relief. In short, the case made by the plaintiff is purely academic." Turpin v. Lemon, 187 U. S. 51, 60. In a more recent case, Hatch v. Reardon, 204 U. S. 152, 160, the same court said: "But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a State on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all."

In another case one Collins, an osteopath, was arrested for violating a law of Texas prohibiting a person from practicing medicine for money without having first procured a license under the statute. He sued out a writ of habeas corpus. It appeared he made no application to the State Medical Board for permission to register, assuming that he would be denied the right, and on this assumption attacked the constitutionality of the law. The Supreme Court, after pointing out his failure to seek the license, and the probability that he might have obtained it if he had applied, said: "On these facts we are of opinion that the plaintiff in error fails to show that the statute inflicts any wrong upon him contrary to the Fourteenth Amendment of the Constitution of the United States. If he has not suffered we are not called upon to speculate upon other cases, or to decide whether the followers of Christian Science * * * might * * * have cause to complain." Collins v. Texas, 223 U. S. 288, 295. So I may say here, we are not called upon to de-

cide whether, if Hirsh desired to sell or rebet his property, the act would interfere with his doing so.

My associates say that the act deprives Hirsh of his right to a trial by jury, in disregard of the Seventh Amendment to the Constitution. But he did not ask for a jury trial. On the contrary, he moved the court under rule 19, as I have shown, for a judgment without the intervention of a jury. Why should they raise a question not presented by the record in order that they may assail an act of Congress, especially in view of the rule, universally held, that it is the duty of all courts to sustain a statute if it can be done. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government can not encroach on the domain of another without injury. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." Sinking-Fund Cases, 99 U. S. 700, 718; Hooper v. California, 155 U. S., 648, 657; Presser v. Illinois, 116 U. S. 252, 269; Grenada County v. Brogden, 112 U. S. 261, 266.

The doctrine of the foregoing cases, which is binding on us, when applied to Hirsh's contentions demonstrates that the latter have no basis in the law. Outside the matter of notice, which I have disposed of, the wrongs of which he complains are imaginary. The questions he raises are purely academic, and not properly before the court for adjudication.

Second. It is urged by Hirsh that the regulation of the use of rental property and of the charges to be made therefor in the District is not within the scope of the police power of Congress, and therefore the act is void. For reasons already given, appellant has no right to raise this question. So far as the act applies to him in the present action it is valid.

Suppose, however, it is open to him to assail the act. Will it stand the test? Congress possesses all the police power within this District that a State legislature has within its State. Washington Terminal Co. v. District of Columbia, 36 App. D. C. 186, 191; District of Columbia v. Brooke, 214 U. S. 147, 149. This is not denied. The police power is a development of the Law. It comprehends much more now than it did sixty years ago. Albeit a part of the common law, it was not known to it under that name. The thirteenth edition of Bouvier's Law Dictionary, published in 1867, did not have it. Chief Justice Marshall seems to be the first to introduce it into the nomenclature of our law when he used it in Brown v. Maryland, 12 Wheat. 419. Under this power Congress has the right "to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction. Chi. B. & Q. R. Co. v. McGuire, 219 U. S. 549, 568. "There is," Mr. Justice Hughes says in the same case, "no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide restrictive safeguards.

Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." A like doctrine is set forth in Crowley v. Christensen, 137 U. S. 86, 89; Jacobson v. Mass., 197 U. S. 11; and Frisbie v. United States, 157 U. S. 160, 165.

Congress, however, may not exercise this power except with respect to business or property clothed with a public interest. But who is to decide when property is so clothed? Manifestly this must be done in the first instance by Congress. "The legislature," said the Supreme Court of the United States in McLean v. Arkansas, 211 U. S. 547, 548, "being familiar with local conditions is, primarily, the judge of the necessity of such enactments." In Clark v. Nash, 198 U. S. 361, 369, it was ruled "that what is a public use may frequently and largely depend upon the facts surrounding the subject." After examining many cases, both Federal and State, the Supreme Court said: "They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation." German Alliance Ins. Co. v. Kans., 233 U. S. 389, 414; see also Chi. B. & Q. R. Co. v. McGuire, 219 U. S. 549, 569; Erie Railroad Co. v. Williams, 233 U. S. 699. Congress, in Section 122 of the act before us, found that it was "made necessary by emergencies growing out of the war with the Imperial German Government, resulting in rental conditions in the District of Columbia dangerous to the public health and burdensome to public officers and employees whose duties require them to reside within the District and other persons whose activities are essential to the maintenance and comfort of such officers and employees, and thereby embarrassing the Federal Government in the transaction of the public business." We must assume that this declaration was made in good faith and represents the deliberate judgment of the Congress. The Supreme Court has asserted "many times that each act of legislation has the support of the presumption that it is an exercise in the interests of the public." Erie Railroad Co. v. Williams, *supra*, 699.

The determination, therefore, by the Congress, presumably after a careful survey of all the pertinent facts,—for we must assume that Congress discharged its full duty Shreveport v. Cole, 129 U. S. 36, 42; Strother v. Lucas, 12 Pet. 410; Boley v. Griswold, 20 Wall. 486, 488; Butler v. Maples, 9 Wall. 766),—that rental property in this District, for the reasons set forth in Section 122, was clothed with a public interest when the Ball Act was passed, is entitled to great respect by the courts, and should not be brushed aside except upon very conclusive proof that it has no basis on which to rest. But we were told at the bar that it had no effect and should be treated by the court as negligible. Counsel frankly admitted that he did not have any authority for this assertion, and my duties have not revealed any.

In Antoni v. Greenhow, 107 U. S. 769, 775, the Supreme Court declared: "We ought never to overrule the decision of the legislative department of the government, unless a palpable error has been committed."

What, then, is the test by which the court is to ascertain whether this determination by Congress is sound? The Supreme Court furnishes it. In Munn v. Illinois, 94 U. S. 113, 132, it said: "For our purposes we must assume that, if a state of facts *could* exist that would justify such legislation, it *actually did* exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. *But if it could, we must presume it did.*" Could there be anything plainer or more direct? In oral argument, it was urged that this statement was merely obiter. In Antoni v. Greenhow, *supra*, after the Munn case had been under the searching scrutiny of the bench and bar for more than six years, the court, citing the Munn case, said: "If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account." The Munn decision has been cited numerous times by the Supreme Court as an authority in actions such as the one before us. Ga. Banking Co. v. Smith, 128 U. S. 174, 180; Budd v. New York, 143 U. S. 517, 543; German Alliance Ins. Co., supra, 409; Brooks Scanlon Co. v. Railroad Commission, decided February 2, this year. In the Kansas case I find this: "Munn v. Illinois was approved in many State decisions, but it was brought to the review of this court in Budd v. New York, 143 U. S. 517, and this doctrine, after elaborate consideration, reaffirmed, and against the same arguments which are now urged against the Kansas statute." Thus it is demonstrated that the doctrine of the Munn case is firmly imbedded in our law.

The majority say with stress that the renting of property in the District is a private business, and, because of this, not affected with a public interest. The same argument was advanced in the Munn and Budd cases, *ante*. In both the owners of the property concerned were private individuals, doing a private business without any privilege or monopoly granted to them by the State; yet it was held, as I have shown, that their property was affected with a public interest. Speaking of the dissenting opinion of Mr. Justice Brewer in the Budd case, in which he urged the private character of the property there involved, the Supreme Court in the German Alliance case, *supra*, said: "Every consideration was adduced, based on the private character of the business regulated and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations urged did not prevail. Against them the court opposed the ever existing police power in government and its necessary exercise for the public good and declared its entire accommodation to the limitations of the Constitution. The court was not deterred by the charge, repeated in the case at bar, that its decision had the sweeping and dangerous comprehension of subjecting to legislative regulation all of the businesses and affairs of life and the prices of all commodities." (p. 409.) While in a sense contracts between landlords and tenants are private, their

effects under conditions like those enumerated by Congress in the act, go beyond the individuals to the contract, and "when this is so," says the Supreme Court in the German Alliance" case, "there are many examples of regulation."

The Supreme Court has approved a statute prohibiting the sale of intoxicating liquors (Mugler v. Kans., 123 U. S. 623); limiting the hours of employment in mines and smelters (Holden v. Hardy, 169 U. S. 366); forbidding the sale of cigarettes without license (Gundling v. Chicago, 177 U. S. 183); requiring the redemption in cash of store orders issued in payment of wages (Knoxville Iron Co. v. Harbison, 183 U. S. 13); prohibiting contracts for options to sell or buy grain (Booth v. Ill., 184 U. S. 425); prescribing the hours of labor for those employed by the State or its municipalities (Atkins v. Kansas, 191 U. S. 207); permitting an individual to condemn property for the purpose of obtaining water for his land (Clark v. Nash, 198 U. S. 361); forbidding the employment of women in laundries more than ten hours a day (Muller v. Oregon, 208 U. S. 412); making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal, instead of weight of the coal as originally produced in the mine (McLean v. Arkansas, 211 U. S. 539); prohibiting contracts limiting liability for injuries, made in advance of the injury received (Chicago, etc., R. R. Co. v. McGuire, *supra*, 549); and regulating the rates to be charged for fire insurance (German Alliance Ins. Co. v. Kansas, *supra*). In each of these cases the right of private contract was involved just as much as it is between a landlord and tenant; yet this did not deter the court from holding that the business or property was affected with a public interest and subject to regulation by the legislature. Courts may take cognizance of whatever is or ought to be generally known within the limits of their jurisdiction. Mc. Nichols v. Pease, 207 U. S. 100, 111; Underhill v. Hernandez, 168 U. S. 250; 15 R. C. L., Sec. 2, p. 1057. I believe the facts found by Congress in Section 122 of the act are substantially correct. It would in truth be a bold act to deny their verity. A careful analysis of the facts in the Munn, Budd, McGuire and German Alliance Insurance Co. cases, *ante*, fails to reveal a reason more imperative for a regulatory act than that which existed when the Ball statute was enacted.

There is, then, not only the rule of the Munn case, namely, that if the facts could exist they must be presumed to exist, but also the knowledge that they did exist, when the act was passed. The burden of establishing that they did not is on the person who attacks the act. Erie Railroad Co. v. Williams, *supra*. Not a thing has been produced to support this burden. None the less we are asked to find, and the majority have yielded to the request, that there is no truth in the congressional statement. To this I am totally unable to agree.

When it is considered that this District was selected as the seat of the Government of the United States (Const. of U. S., Art. I, Sec. 8), and that there existed therein a condition of affairs such as Congress sets forth in the act, to say that the Government is power

less to afford any relief is to attribute to it a weakness that would be, indeed, unfortunate.

The decisions cited by the majority on this point either support my position or can be easily differentiated from the case before us; but I can analyze only one. Weems Steamboat Co. v. People's Steamboat Co., 214 U. S. 345, without unreasonably extending this opinion. I take that case because appellant seems to place much reliance upon it. The complainant, a steamboat company, owned wharves on the Rappahannock River. The defendants, a steamboat company and its officers, demanded the right to use the wharves without the consent of the owner upon paying a reasonable compensation. The court held that the complainant was not obliged to yield to the demands of the defendants, and an injunction issued against the latter forbidding them to interfere with complainant in the use of its property. The complainant had not offered its property for rent. No statute was involved. It was an attempt by the defendants to compel the complainant to grant them a right in its private property. Nothing of that nature is involved here. Therein lies the distinction between that case and this. Property owners are not obliged to devote their property to rental purposes, but when they do under the conditions established here, it is subject to the regulatory power of Congress. "Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be juris privati only.'" Munn v. Illinois, *supra*, 126.

In the light of what has been said, I see no escape from the conclusion that the business of renting property in this District under the conditions mentioned is affected with a public interest.

Third. The fact that Congress has power to regulate does not establish by any means that it may disregard constitutional guaranties and deprive an owner of his property without due process or deny him a reasonable compensation for its use. The power is subject to constitutional limitations. As I have heretofore shown, the act under review does not impinge on any constitutional right which Hirsh is entitled to assert here. If in a proper action by him it should appear that the enforcement of any of the provisions of the act would deprive him of such a right, the courts will be open for his protection. Certain provisions may be void but that would not render the whole act illegal. Section 121 provides: "If any clause, sentence, paragraph, or part of this title (act) shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof but shall be confined in its operations to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered." In a decision of the Supreme Court of the United States rendered March 22, this year, the constitutionality of certain statutes of Oklahoma was considered. The statutes prescribed that a commission should fix maximum rates for services performed by a laundry company. It was provided that disobedience to an order establishing rates would

be a contempt of the commission and subject the recalcitrant company to a penalty not exceeding $500 a day. No right of direct appeal to the courts from the action of the commission fixing the rates was permitted, but the company might appeal from a judgment finding it guilty of contempt for disobeying the commission's order. If, however, it failed on the appeal, it might be subjected to the penalty. The Supreme Court held that "a judicial review beset by such deterrents does not satisfy the constitutional requirements," and therefore that the provisions of the acts imposing a penalty pending an appeal were unconstitutional in certain aspects; but that did not, in the judgment of the court, render the other part of the acts void. It was ruled that "If upon final hearing the maximum rates fixed should be found not to be satisfactory, a permanent injunction should nevertheless issue to restrain the enforcement of penalties accrued *pendente lite* provided that it also be found that plaintiff had reasonable ground to contest them as being confiscatory." Okla. Operating Co. v. J. E. Love et al., — U. S. —. So here, if any of the provisions of the act before us should be found to be offensive to the Constitution, they may fall without dragging down the remainder of the act.

For the reasons given, I think the judgment of the lower court should be affirmed.

Wednesday, June 2nd, A. D. 1920.

April Term, 1920.

No. 3372.

Louis Hirsh, Appellant,

vs.

Julius Block, Trading and Carrying on Business under the Name and Style of Whites.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby reversed with costs and that this cause be and the same is hereby remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Justice VAN ORSDEL.

June 2, 1920.

Mr. Chief Justice Smyth dissenting.

In the Court of Appeals of the District of Columbia.

No. 3454.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of Whites, Appellant,

vs.

LOUIS HIRSH, Appellee.

Comes now the appellant, and to the end that the above entitled cause may be heard on review by the Supreme Court of the United States prays a Writ of Error in that behalf, according to the form of the Statute in such case made and provided, and that the penalty of the bond thereon to operate as a supersedeas be fixed in the sum of Eighty-five hundred Dollars.

JULIUS I. PEYSER,
JESSE C. ADKINS,
Attorneys for Appellant.

Endorsed: No. 3454. Julius Block, trading and carrying on business under the name and style of Whites, appellant, vs. Louis Hirsh. Petition for writ of error. Court of Appeals, District of Columbia. Filed November 18, 1920. Henry W. Hodges, Clerk.

Thursday, November 18th, A. D. 1920.

No. 3454.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of Whites, Appellant,

vs.

LOUIS HIRSH.

On motion of Mr. George E. Edelin, of counsel for the appellant, it is ordered by the Court that a writ of error to remove the above entitled cause to the Supreme Court of the United States issue, and the bond to act as supersedeas is fixed at the sum of eight thousand five hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Julius Block, Trading and carrying on business under the Name and Style of Whites, Appellant, and Louis

Hirsh, appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 23rd day of November, in the year of our Lord one thousand nine hundred and twenty.

[Seal of Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

(*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Julius Block, as principal, and Fidelity and Deposit Co. of Md. as surety, are held and firmly bound unto Louis Hirsh, in the full and just sum of Eight Thousand Five Hundred ($8,500.00) Dollars, to be paid to the said Louis Hirsh, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-third day of November in the year of our Lord one thousand nine hundred and twenty.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between Julius Block, trading and carrying on business under the name and style of Whites, Appellant, and Louis Hirsh, Appellee, a judgment was rendered against the said Julius Block and the said Julius Block having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Louis Hirsh citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Julius Block shall prosecute said writ of error to effect, and answer

all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JULIUS BLOCK. [SEAL.]
FIDELITY AND DEPOSIT CO. OF MD. [SEAL.]
B. E. GERMANN, [SEAL.]
Atty. in Fact.

[Seal of the Fidelity and Deposit Co. of Md.]

Sealed and delivered in the presence of—
WM. C. HAMMETT.

Approved by—
C. J. SMYTH,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 3454. Julius Block, trading and carrying on business under the firm name and style of Whites, Appellant, v. Louis Hirsh. Supersedeas Bond on Writ of Error to Supreme Court of the United States. Court of Appeals, District of Columbia. Filed Nov. 23, 1920. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 3454.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of Whites, Appellant.

vs.

LOUIS HIRSH, Appellee.

Assignment of Errors.

The Court erred as follows in rendering judgment in the above-entitled cause:

1. The Court erred in holding the Ball Rent Act, Public #63, 66th Congress, approved October 22, 1919, unconstitutional.

2. The Court erred in holding that the business of renting of real estate in the District of Columbia is not affected with a public use.

3. The Court erred in holding that the business of renting real estate in the District of Columbia is a private business.

4. The Court erred in holding that the regulations of the business of renting real estate in the District of Columbia was not a legitimate exercise of the police power of the Congress of the United States.

5. The Court erred in holding that the determination of whether or not a business is affected with a public use is a judicial function.

6. The Court erred in holding that the determination of whether or not a business is affected with a public interest is not a legislative function.

7. The Court erred in holding that the Ball Rent Act deprives parties litigant of their right to a trial by jury.

8. The Court erred in holding that the Ball Rent Act is a violation of the due process clause of the Fifth Amendment of the Constitution.

9. The Court erred in holding that the appellant was so affected and prejudiced by the application of the Ball Rent Act that he could attack its constitutionality.

10. The Court erred in not holding the Ball Rent Act constitutional and valid.

11. The Court erred in affirming the judgment of the Supreme Court of the District of Columbia.

12. The Court erred in not reversing the judgment of the Supreme Court of the District of Columbia.

JULIUS I. PEYSER,
JESSE C. ADKINS,
Attorneys for Appellant.

Endorsed: No. 3454. Julius Block, trading and carrying on business under the name and style of Whites, Appellant, vs. Louis Hirsh. Assignment of Errors. Court of Appeals, District of Columbia. Filed November 18, 1920. Henry W. Hodges, Clerk.

In the Court of Appeals of the District of Columbia.

No. 3454.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of "Whites," Appellant,

vs.

LOUIS HIRSH, Appellee.

Supplemental Assignment of Error.

13. The Court erred in holding that the regulation of the business of renting real estate in the District of Columbia was not a legitimate exercise of the war power of the Congress of the United States.

JULIUS I. PEYSER,
JESSE C. ADKINS,
Attorneys for Appellant.

Endorsed: No. 3454. Julius Block, trading and carrying on business under the name and style of "Whites," Appellant, vs. Louis Hirsh. Supplemental assignment of error. Court of Appeals, District of Columbia. Filed November 24, 1920.

UNITED STATES OF AMERICA, ss:

To Louis Hirsh, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Julius Block, trading and carrying on business under the name and style of Whites, Appellant, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Constantine J. Smyth, Chief Justice of the Court of Appeals of the District of Columbia, this 23d day of November, in the year of our Lord one thousand nine hundred and twenty.

CONSTANTINE J. SMYTH,
Chief Justice of the Court of Appeals of the District of Columbia.

Service acknowledged:
W. G. JOHNSON,
Counsel for Louis Hirsh.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov 23, 1920. Henry W. Hodges, Clerk.

No. 3454.

JULIUS BLOCK, Trading and Carrying on Business under the Name and Style of "Whites," Appellant,

vs.

LOUIS HIRSH, Appellee.

Designation of Record.

It is hereby agreed and stipulated between counsel that the transcript of record on Writ of Error from the Supreme Court of the United States herein shall include the papers listed below, and the Clerk is requested to prepare the transcript including the said papers.

1. Printed Record.
2. Appellee's motion to advance.
3. Appellee's motion to advance and submit granted.
4. Order affirming judgment with costs.

5. Opinion per Curiam.

6. Dissenting opinion by Chief Justice Smyth.

7. Opinion and dissenting opinion in No. 3372.

8. Petition for writ of error.

9. Order allowing writ of error.

10. Supersedeas Bond.

11. Writ of Error.

12. Assignment of error.

13. Supplementary Assignment of Error.

14. Citation with acceptance of service.

15. This designation.

W. G. JOHNSON,
Attorney for Appellee.
JULIUS I. PEYSER,
JESSE C. ADKINS,
Attorneys for Appellant.

[Endorsed:] No. 3454. Julius Block, trading and carrying on business under the name and style of Whites, appellant, vs. Louis Hirsh. Designation of record. Court of Appeals, District of Columbia. Filed Nov. 24, 1920. Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 59 inclusive constitute a true copy of the transcript of record and proceedings of said Court of Appeals, as designated by counsel in the case of Julius Block, trading and carrying on business under the name and style of Whites, Appellant, vs. Louis Hirsh, No. 3454, October Term, 1920, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 24th day of November, A. D. 1920.

[Seal of Court of Appeals, District of Columbia 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 27,997. District of Columbia, Court of Appeals. Term No. 640. Julius Block, trading and carrying on business under the name and style of Whites, plaintiff in error, vs. Louis Hirsh. Filed December 6th, 1920. File No. 27,997.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 640.

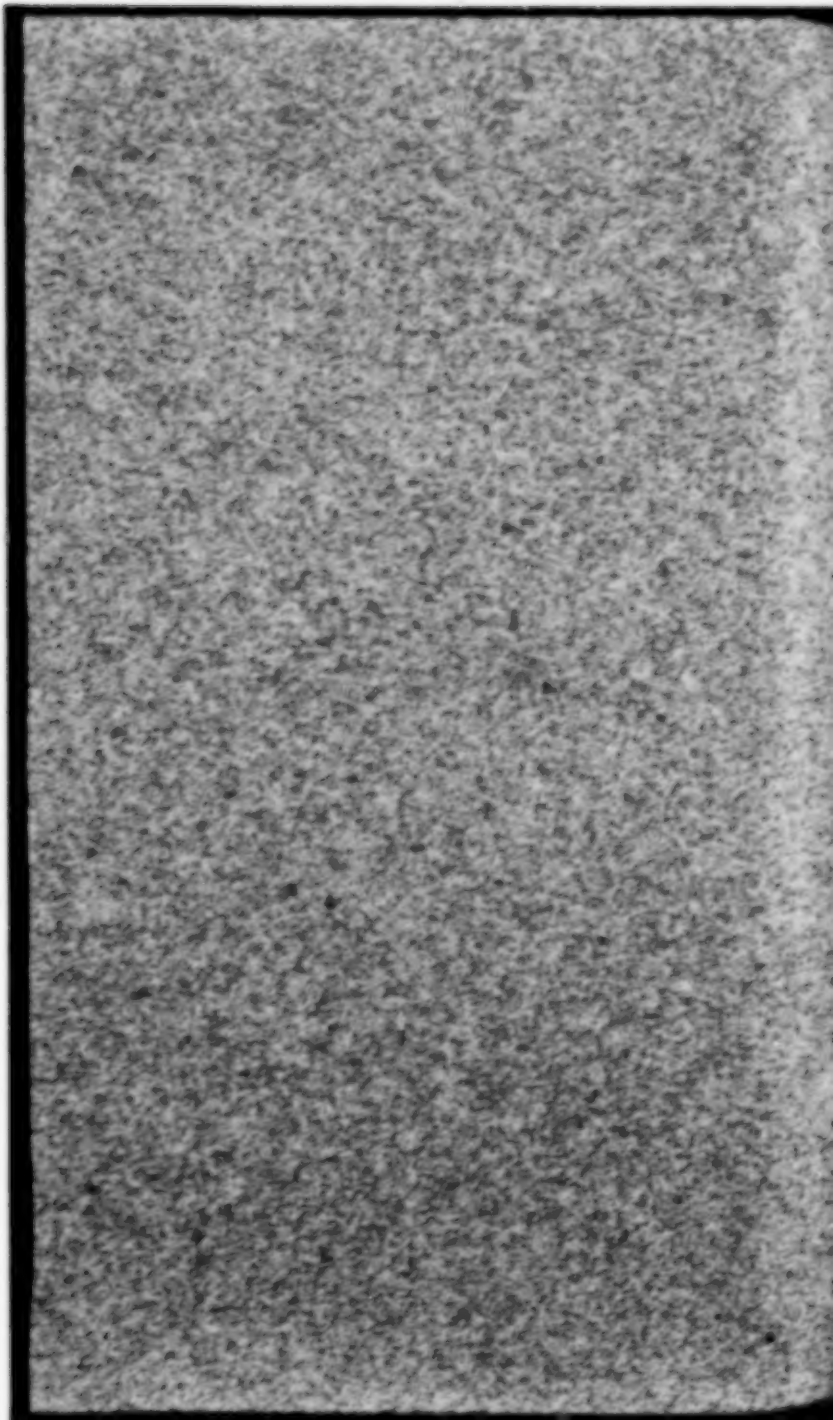
JULIUS BLOCK

vs.

LOUIS HIRSH.

MOTION TO ADVANCE.

JULIUS I. PEYSER,
JESSE C. ADKINS,
Attorneys for Plaintiff in Error.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 640.

JULIUS BLOCK

vs.

LOUIS HIRSH.

MOTION TO ADVANCE.

The plaintiff in error moves to advance the above-entitled case and to fix an early date for the hearing thereof.

This case involves the constitutionality of the so-called District of Columbia Rents Act. This statute was a part of the act of Congress of October 22, 1919, amending the Lever Act, which amendment was involved in a number of cases recently argued before this court.

The District of Columbia Rents Act establishes a Rent Commission in the District of Columbia, with power to fix reasonable rents for all rental property in the District. The court below held the entire act to be unconstitutional. There was a dissenting opinion written by Chief Justice Smyth.

A large number of cases arising under the same statute are pending in the courts below. Notwithstanding the decision of the Court of Appeals, the Rent Commission is still functioning.

The statute by its terms continues for only two years, which will expire before this case is reached in the ordinary course.

A number of States have passed acts somewhat similar to the one here involved.

The housing question is one of the most important public questions now before the country. This court's decision on this statute is important, not only to the Federal Government, but to each State government. The circumstances are so special and peculiar that the case should be advanced under paragraph 7 of Rule 26 of this court.

Respectfully,

JULIUS I. PEYSER,
JESSE C. ADKINS,
Attorneys for Plaintiff in Error.

No. 640.

In the Supreme Court of the United States.

OCTOBER TERM, 1930.

JULIUS BLOCK, PLAINTIFF IN ERROR,

v.

LOUIS THESS, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

STATEMENT OF THE SOLICITOR GENERAL IN SUPPORT OF MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

JULIUS BLOCK, PLAINTIFF IN ERROR,
v.
LOUIS HIRSH, DEFENDANT IN ERROR. } No. 640.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

STATEMENT OF THE SOLICITOR GENERAL IN SUPPORT OF MOTION TO ADVANCE.

The Solicitor General, on behalf of the United States, as *amicus curiae* in the above-entitled cause, respectfully submits the following considerations in support of the motion to advance the same for hearing:

1. This case turns upon the constitutionality of the District of Columbia Rents Law, forming Title II of the act approved October 22, 1919, amending the Food Control (Lever) Act (41 Stat., c. 80, p. 298). Its text embodies an express declaration that its provisions "are made necessary by emergencies growing out of the war * * * resulting in rental conditions in the District of Columbia dangerous to

the public health and burdensome to public officers and employees whose duties require them to reside within the District * * * and thereby embarrassing the Federal Government in the transaction of the public business." (Id., p. 304, sec. 122.) Hence, the Government has an immediate and vital interest in maintaining the legislation designed to remedy the evils incident to the abnormal housing situation in the District of Columbia.

2. The present condition of anxiety and uncertainty, resulting from the Court of Appeals having held the act void in all its aspects, will continue until the final settlement of this important constitutional question. There are in the various courts of the District literally hundreds of dispossession cases brought upon the theory that the act is a nullity and the Rent Commission nonexistent. Inability to get an early hearing in this court may present the alternative of the eviction of large numbers of tenants, without possibility of restitution, or the unprecedented multiplication of appeals.

3. The act expires by limitation on October 22, 1921, and the interest of all classes of population requires that its validity should be determined as far as possible in advance of its termination.

Respectfully submitted.

WILLIAM L. FRIERSON,
Solicitor General.

DECEMBER, 1920.

○

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 640.

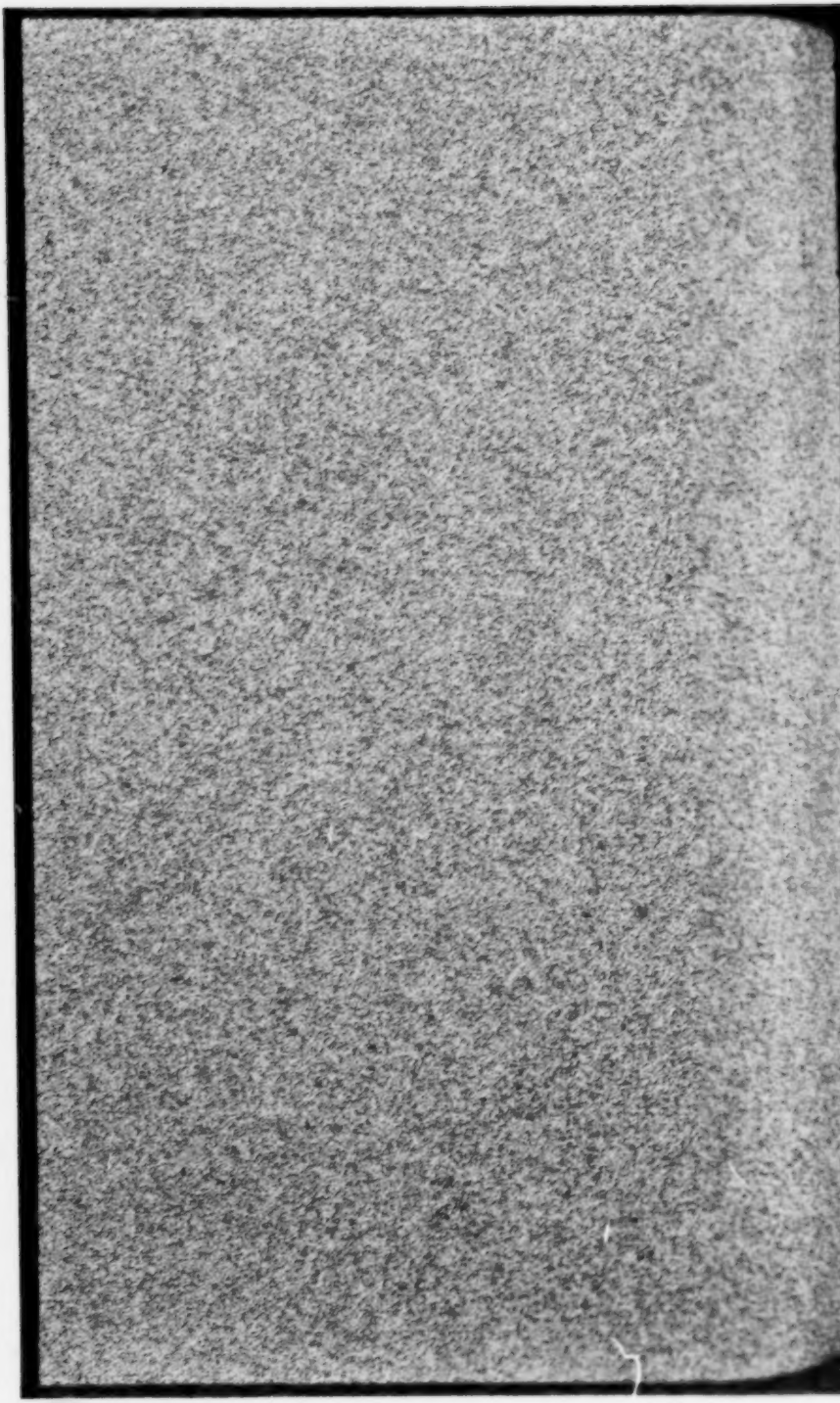
JULIUS BLOCK, PLAINTIFF IN ERROR,

vs.

LOUIS HIRSH, DEFENDANT IN ERROR.

BRIEF FOR THE PLAINTIFF IN ERROR.

JULIUS I. PEYSER,
JESSE C. ADKINS,
GEORGE E. EDELIN,
THEODORE D. PEYSER,
Attorneys for Julius Block.



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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 640.

JULIUS BLOCK, PLAINTIFF IN ERROR,

vs.

LOUIS HIRSH, DEFENDANT IN ERROR.

BRIEF FOR THE PLAINTIFF IN ERROR.

The Question.

The question in this case is whether in the emergency due to the shortage of buildings in the District of Columbia, which shortage interfered with the functioning of the Government and was injurious to the health, safety, morals, and welfare of the people, Congress could during a period of two years protect the Government, its employees, and the tenant class generally in the District from oppression and extortion

and other evils resulting from overcrowding (1) by requiring every landlord to give thirty days' notice to his tenant before beginning proceedings to repossess the property, and (2) by requiring that the rents of all property devoted to rental shall be just and reasonable, and creating a commission with power to regulate rents? In short, is the District of Columbia Rents Act approved October 22, 1919, constitutional, or does it take property without just compensation and without due process of law?

The Facts.

The present case may be disposed of by sustaining the power of Congress to require the landlord to give thirty days' notice to quit. In this respect the present statute is merely a modification of the landlord's remedies. Many States have always required a notice to quit in *all* tenancies. Such was the law in the District prior to 1864. Such a change in remedy is clearly valid. However, the majority of the Court of Appeals held the entire statute unconstitutional. Therefore both questions will be discussed.

The property concerned is the first floor and cellar of 919 F street northwest, in the city of Washington. This is a three-story building. For many years it has been rented out in parts to various tenants.

December 1, 1916, plaintiff in error, Block, leased the property from the then owners for three years, to commence January 1, 1917, and end December 31, 1919. The lease contained a covenant that Block "*will at the end of his tenancy* surrender the said leased premises in such substantial condition" as aforesaid (Rec., 5).

Under the common law in force in Maryland prior to

1793, the landlord's remedy against a tenant holding over was ejectment.

By the act of Maryland of 1793 (chapter 43, Kilty's Statutes, 249, 251; Thompson's Digest of the laws of the District of Columbia, 281), a summary remedy before a justice of the peace was also given. Before the landlord could avail himself of this remedy, in case of a lease for one or more years, he must give the tenant thirty days' notice before the termination of the lease. (See the statute and quotation from Thompson's Digest, Appendix A.)

The act of July 4, 1864 (13 Stat., 383), section 2, modified this law by dispensing with notice where the lease was determined by limitation. This was carried forward in sections 20 and 1218 of the Code.

The Rents Act, approved October 22, 1919, declared that under certain conditions and subject to the fixing of a just and reasonable rent, tenancies then in force should continue during the life of the act, a period of two years. The act provided that this should "be subject to the limitation that the *bona fide* owner of any rental property * * * shall have the right to possession thereof for actual and *bona fide* occupancy by himself * * * upon giving thirty days' notice in writing, served in the manner provided by section 1223" of the Code (section 106).

After the passage of this act, Hirsh, defendant in error, bought the property, and took title November 13, 1919 (R., 12). Admittedly he was a *bona fide* purchaser for his own occupancy, and required and intended to use the property as a store (R., 12), and he came strictly within the proviso above quoted.

At the time the lease was made the owner of the property was entitled to bring summary landlord and tenant proceedings on January 2, 1920, *without giving notice*. Before Hirsh took title, the law had been modified; the tenant Block must have a thirty-day notice, as had been the law prior to 1864. Had Hirsh given the thirty-day notice he would have been entitled to begin summary proceedings on January 2.

Hirsh declined to give the *thirty days'* notice, though on December 15, 1919, he did notify Block he desired the premises (R., 12).

On January 6, 1920, Hirsh brought suit in the Municipal Court. Judgment went against him, and he appealed to the Supreme Court of the District. Proceeding under the 19th rule, he filed an affidavit of merit stating the foregoing facts (R., 11). Block replied, relying on the Rents Act (R., 13). Hirsh moved for judgment, the motion was denied, and final judgment entered against him. He appealed to the Court of Appeals. The majority of that court held the act unconstitutional in every respect, reversed the judgment, and remanded the cause. The Chief Justice dissented, believing the statute constitutional. Thereupon the Supreme Court of the District entered judgment for Hirsh. Block appealed to the Court of Appeals, where this judgment was affirmed, from which this writ of error is prosecuted.

The Conditions Requiring the Statute.

Prior to our entrance in the war, building throughout the country had fallen behind and urban population had largely increased. The situation was far from normal when war was

declared on April 6, 1917. Great congestion in housing conditions soon ensued.

The District of Columbia is the seat of the National Government. Nowhere was the congestion in business and housing property greater than here.

The Government employees increased in vast numbers—from 35,477 to 94,556. They must be accommodated somehow.

They were packed into the existing offices. Hotels, apartment-houses, private office buildings, and residences were rapidly taken for Government offices. Still more room was needed. Enormous barrack-like structures, of wood and of concrete, were built almost overnight. They covered acres of ground, were among the largest office buildings in the world, capable of housing tens of thousands. They were soon filled to overflowing.

Aside from the Government, there was great demand for business property in Washington. Many organizations of business men needed headquarters here. The interruption to business through the system of priorities, price-fixing, etc., was so great that Government officials were in constant conference with representatives of every industry.

Large corporations performing war contracts needed representatives here to facilitate their work.

There was an unusual amount of welfare and community work carried on in Washington. Numerous charitable organizations established offices here. They were compelled to take large residences for office purposes.

Clubs of all kinds were established, not only for the officers, but for the men in uniform and for the Government

workers. Each of these organizations decreased by so much the available office and living accommodations.

This unprecedented demand for office space—all caused by the war—thus greatly lessened the housing facilities. The demand for this rapidly diminishing shelter was even greater than for offices.

The Government employees multiplied threefold. The call was as widespread as that for soldiers. The response of the women of the country to this urgent demand has been likened to the pilgrimage of St. Ursula and her eleven thousand virgins to their martyrdom at Cologne, some fifteen hundred years ago (Report of the District of Columbia Council of Defense, p. 19).

Almost impossible as it was to house this multitude, more must be done for them. They must be transported, fed, clothed, amused, and provided with medical and other necessary attention.

For these reasons, due solely to the existence of the war, there was thus suddenly crowded into the capital of the Nation perhaps 50 per cent more than its normal population. Of course, the facilities of the city with respect to all real property were taxed far beyond their capacity.

The abnormal demand applied to all buildings. Relief could not be obtained by new construction. Building materials were scarce and could not be transported; labor was even harder to get. Finally all private building was forbidden as a war measure.

True, many office buildings were erected for the Government. They but aggravated the evil, for they brought thousands of additional employees to be sheltered.

There were in Washington many business properties,

hotels, apartment-houses, and dwellings which were always devoted to rental purposes. The natural result of this unprecedented demand and great shortage was a large increase in rents. There was a virtual monopoly of business and residential property in the District. The owners were evicting tenants in large numbers and were demanding unreasonable and unjust rents. The result was an auction between the tenant in possession and the newcomer.

Every tenant lived in dread that his turn would come next. He had to move or pay a rent beyond his means. The result was great overcrowding, with all its attendant evils injurious to the health, order, morals, and welfare of the community.

Congress early began to investigate and to seek some relief from the intolerable conditions. The relief which would come from adequate building was forbidden during the war.

Finally Congress passed the so-called Saulsbury Resolution, approved May 31, 1918. This resolution gave the tenant the right to continue in possession indefinitely at the old rent. An owner in the Government service or a *bona fide* purchaser who desired the property for his own occupancy might recover possession.

This legislation greatly helped the situation. Indeed, without it, conditions in Washington would have been intolerable. But it was far from satisfactory. In many cases it worked hardship on the landlord, and it did not prevent extortion with respect to property falling vacant.

Congressional committees and Government bodies continued to investigate and to seek better remedies.

The United States Housing Corporation constructed dormitories for women capable of housing some nineteen hundred people. The same body under authority of the act of May

16, 1918, commandeered one hundred and forty-one houses in Washington. Sixty-four were released to the owners on condition that the vacant bed-rooms be rented to war workers, and thirty-two were released for other reasons. Some of the others were leased to persons who agreed to house war workers, and others were operated by the corporation through matrons (Report of the U. S. Housing Corporation, December 3, 1918, pp. 105, 109).

The signing of the armistice did not improve matters. The decrease of the population in Washington was remarkably small. The demand for property, both residential and business, became even greater.

Soldiers were returning to their families and greater accommodations were needed. Conditions cheerfully borne during the fighting became unendurable. Many who had left their families elsewhere desired to bring them to Washington. People who had lived in one room desired apartments or dwellings. Those who had lived four or more in a room desired separate rooms. So that in October, 1919, the housing situation in the District of Columbia was as bad as it had ever been. There had been practically no building for years. Washington had a population of tens of thousands more than it could comfortably accommodate. Now that the fighting had ceased, landlords were no longer afraid of being called profiteers. The price-fixing system adopted during the fighting was abandoned, and the cost of all necessaries went to unheard-of figures. Landlords did not lag behind. The cost of building had doubled over the war cost. Materials were still scarce and transportation facilities were as bad. The legal prohibition against building had been succeeded by a practical prohibition even more potent.

After a careful investigation, covering a year and a half, and the taking of much testimony by committees, Congress, in October, 1919, passed the statute herein in question. It is a part of the amendment to the Lever Act, which seeks to prevent profiteering in food, fuel, and other necessaries of life.

Before the passage of the bill the Senate committee in its report said:

> "The housing and rental problem in the District of Columbia has for more than a year and a half been recognized as extremely grave and has been the subject of extended discussion and proposed legislation in both houses of Congress as well as newspaper and public comment.
>
> "The present shortage of housing facilities is not of course peculiar to this community, but is more or less general throughout the entire country, especially in larger cities, notably New York, where vigorous methods were adopted by the municipal authorities to check profiteering in rents" (Sen. Rep. 327).

And Congress itself, after its investigation, sums up the economic situation in the last section of the statute:

> "SEC. 122. It is hereby declared that the provisions of this title are made necessary by emergencies growing out of the war with the Imperial German Government, resulting in rental conditions in the District of Columbia dangerous to the public health and burdensome to public officers and employees whose duties require them to reside within the District and other persons whose activities are essential to the maintenance and comfort of such officers and employees, and thereby embarrassing the Federal Government in the

> transaction of the public business. It is also declared that this title shall be considered temporary legislation, and that it shall terminate on the expiration of two years from the date of the passage of this act, unless sooner repealed."

That this finding is in accord with the facts clearly appears from the foregoing. That the emergency still exists is equally clear.

Foreign countries and various States have felt the evils, and have sought relief during the emergency by similar legislation.

Maine, New York, Massachusetts, Wisconsin, New Jersey, and North Dakota have passed statutes, some before and some after that here involved. Congress has continued its investigations.

All agree that there is a great emergency which will last for several years. While some of the States seek to encourage building by lessening taxes on new property or providing for the loaning of money, they agree that this remedy cannot be effective for two or three years.

In New York it was said the shortage was so great that "if all the money available in the New York market and throughout the State were put forward tomorrow it would be impossible to build even in a year, utilizing every bit of man power or material available, houses enough to take care of the shortage" (Report of Housing Committee of Reconstruction Committee of New York, March 22, 1920, pp. 2, 3).

The consensus of legislative opinion seems to be that during this emergency the landlord class, possessing a virtual monopoly of the greatest necessity of life in this climate, should be permitted to charge only just and reasonable rates.

and that so long as the owner rents his property he must recognize the equity of the tenant to remain on paying just and reasonable rents.

The situation in New York is as bad, if not worse, than that existing here. Laws passed in April, 1920, being found inadequate, a special session of the legislature was called in September, 1920.

The Joint Legislative Committee on September 20, 1920, reported to the New York legislature that it estimated the shortage of houses in New York State at that time to be approximately one hundred thousand; that one hundred thousand apartments were needed in New York city; that the summary or dispossess proceedings in New York city in the month of October, 1920, would approximate one hundred thousand, and that if they were permitted to proceed five hundred thousand people, or one-tenth of the population of the city, would be forced to move. Among other things, the committee said:

> "The Federal, State, and city health authorities direct the attention of the nation to the overcrowding, especially in the large cities, and point out that the housing situation presents a potential danger and menace to the public welfare. The old, abandoned, unsanitary tenements are necessarily occupied and the slum is again raising its head in the cities.
>
> "The stability and progress of a people depend upon the comfort, healthfulness and security under which they live. Shelter is a necessity of life and the home the bulwark of the Nation.
>
> "The housing shortage developed a practice of rent profiteering national in its scope and consequences. Tenants were evicted by the thousands because they were unwilling or unable to pay a

greatly increased rental. Rent riots occurred in a number of the cities. * * *

"It was not until the housing matter affected not only the very poor but the average citizen that the question has become one of great public interest" (Report of the Joint Legislative Committee on Housing, transmitted Sept. 29, 1920, pp. 3-4). * * *

"The unrest that is generated in the home of a family which is harassed by high rents and undesirable change of domicile goes out into the community through the individuals so affected, so as seriously to menace the general welfare. * * * The most flagrant and the most acute form of extortion and one which is almost inescapable is rent profiteering. And as for eviction, never in the history of the city of New York have there been so many evictions" (p. 5).

The Health Department of New York city reported:

"*Respiratory and contagious diseases* in infancy and early childhood are largely the result of close and indiscriminate contact, and the present housing situation, which has necessitated not only the doubling up of families, but the housing of large families in a smaller number of rooms than was the case in pre-war times has afforded that close contact and inability to properly isolate which make for the spread of these diseases. It is our impression, that not only has the incidence of those diseases been increased, but that the greater mortality is largely due to the fact that, because of such close contact, the dosage of infection (if we may use that term) has been larger and, as a consequence, the virulence of the diseases greater. It is a universal experience that infants and young children are most sensitive to unfavorable environment, and are the first to suffer

> when such conditions arise, and it is thus seen that the housing situation bears a distinct relationship, not only to the health and well-being, comfort and happiness of the adult population, but also to the health and lives of infants and young children" (Health Dept. Bulletin, new series, Vol. IX, No. 42).

The Senate Committee on Reconstruction, in a report submitted December 14, 1920 (66th Cong., 3d session, Senate Report 566), says:

> "There is no doubt that there exists a serious shortage of housing, not only in the great cities but in the smaller cities as well, even in the far West and South, and that this shortage has a material effect upon industrial growth and upon public health and morals" (*Ib.*, 1).
>
> "It now seems beyond the power of private individuals, municipalities, or States to overcome the present handicaps of transportation, fuel, finance, and taxation" (*Ib.*, 2).

Senator Kenyon thus tersely states it:

> "The housing situation is a menace to the nation" (*Ib.*, 7).

In a report to the Senate Reconstruction Committee, made December 4, 1920, by the American Health Association, composed of Commissioners of Health of the largest American cities, it is said that the housing survey of cities of population of over two hundred thousand shows:

1. In every city there is abnormal overcrowding, affecting from 20 to 30 per cent of the population.

2. For three years there has been an average diminution of 80 per cent in building for residential purposes.

3. Thousands of families are forced into unsanitary and dangerous quarters.

4. Overcrowding has caused marked increase in infant mortality, which is 80 per cent higher in districts of greatest overcrowding.

5. Overcrowding has propagated and spread tuberculosis, which is twice as prevalent in crowded quarters as in areas of normal housing.

6. Overcrowding has rapidly spread communicable diseases, especially those of the respiratory tract, including influenza and pneumonia.

7. Overcrowding increases social disease.

8. Overcrowding increases mental and moral degeneracy.

The association takes the position that ideal housing conditions to meet health, comfort, good morals and good citizenship demand that every American family occupy a single dwelling or apartment; calls attention to the serious danger of epidemics and concludes:

> "12. The entire housing problem is so urgent and its dangers so imminent that decisive and immediate action is imperative. We beg of you to lose no time in finding a remedy for the conditions that threaten the lives of our people and the stability of our government."

With this weighty testimony, which in some points was before the committees of Congress, and in order to protect

the health and morals of the people, the safety, good order, and welfare of the community, to permit the Government itself to function, and to protect the tenants from the oppression of the landlords, Congress passed the act now under consideration.

The Rents Statute.

The first effect of the statute relates to notices to quit; it restores the law as it existed prior to 1864—that is, requires that in tenancies for a definite term as well as at will the landlord must give thirty days' notice before he may terminate the tenancy and bring suit.

The second effect is to regulate the business of renting improved real estate in the District of Columbia, because for the time that business holds such a peculiar relation to the public interests that the regulation is necessary.

The purpose and necessity for the statute is shown in section 122 quoted above (*b*).

The statute is to continue in force for two years only.

Section 121 provides that if any clause, sentence, paragraph or part of the statute shall be held invalid that judgment shall not invalidate the remainder of the act.

By section 101 rental property in the District is divided into two classes: (*a*) rental property, which includes all except hotels and apartments; and (*b*) hotels and apartments.

Section 102 creates a Rent Commission composed of three commissioners. Section 103 provides for a secretary and other employees. Section 104 makes the assessor of the District of Columbia an advisory assistant to the commission.

Section 105 gives the right to the commission to issue subpœnas, administer oaths, etc.

Section 106, the most important one of the statute, provides:

> "SEC. 106. For the purposes of this title it is declared that all (*a*) rental property and (*b*) apartments and hotels are affected with a public interest, and that all rents and charges therefor, all service in connection therewith, and all other terms and conditions of the use or occupancy thereof shall be fair and reasonable. The commission upon its own initiative may, or upon complaint shall, determine whether the rent, charges, service, and other terms or conditions of a lease or other contract for the use or occupancy of any such rental property, hotel, or apartment are fair and reasonable. Such complaints may be made (*a*) by or on behalf of any tenant, and (*b*) by any owner except where the tenant is in possession under a lease or other contract, the term specified in which has not expired, and the fairness and reasonableness of which has not been determined by the commission.
>
> "In all such cases the commission shall give notice personally or by registered mail and afford an opportunity to be heard to all parties in interest. The Commission shall promptly hear and determine the issues involved in all complaints submitted to it. All hearings before the commission shall be open to the public. If the commission determines that such rents, charges, service, or other terms or conditions are unfair or unreasonable, it shall determine and fix such fair and reasonable rent or charges therefor, and fair and reasonable service, terms, and conditions of use or occupancy. In any suit in any court of the United States or the District of Columbia involving

any question arising out of the relation of landlord and tenant with respect to any rental property, apartment, or hotel, except on appeal from the commission's determination as provided in this title, such court shall determine the rights and duties of the parties in accordance with the determination and regulations of the commission relevant thereto."

Section 107 provides that the determination of the commission shall date from the filing of the complaint.

Section 108 provides for an appeal from the commission to the Court of Appeals of the District on questions of law.

Section 109 reads:

"SEC. 109. The right of a tenant to the use or occupancy of any rental property, hotel or apartment, existing at the time this act takes effect, or thereafter acquired, under any lease or other contract for such use or occupancy or under any extension thereof by operation of law, shall, notwithstanding the expiration of the term fixed by such lease or contract, continue at the option of the tenant, subject, however, to any determination or regulation of the commission relevant thereto; and such tenant shall not be evicted or dispossessed so long as he pays the rent and performs the other terms and conditions of the tenancy as fixed by such lease or contract, or in case such lease or contract is modified by any determination or regulation of the commission, then as fixed by such modified lease or contract. All remedies of the owner at law or equity, based on any provision of any such lease or contract to the effect that such lease or contract shall be determined or forfeited if the premises are sold, are hereby suspended so long as this title is in force. Every purchaser shall take con-

veyance of any rental property, hotel, or apartment subject to the rights of tenants as provided in this title. The rights of the tenant under this title shall be subject to the limitation that the *bona fide* owner of any rental property, apartment, or hotel shall have the right to possession thereof for actual and *bona fide* occupancy by himself, or his wife, children, or dependents, or for the purpose of tearing down or razing the same in order immediately to construct new rental property, hotel, or apartment if approved by the commission, upon giving thirty days' notice in writing, served in the manner provided by section 1223 of the act entitled 'An Act to establish a code of laws for the District of Columbia,' approved May 3, 1901, as amended, which notice shall contain a full and correct statement of the facts and circumstances upon which the same is based; but in no case shall possession be demanded or obtained by such owner in contravention of the terms of any such lease or contract. If there is a dispute between the owner and the tenant as to the accuracy or sufficiency of the statement set forth in such notice, as to the good faith of such demand, or as to the service of notice, the matters in dispute shall be determined by the commission upon complaint as provided in section 106 of this title."

Section 110 provides that the determination of the commission shall not be superseded by appeal. Section 111 continues the determination in force notwithstanding a change in ownership or occupancy of the property.

Under section 112 if the owner collects rent in excess of that fixed by the commission he shall be liable to suit by the commission for double the amount of such excess. After refunding to the tenant the remainder is to be paid into the Treasury of the United States.

Section 113 prohibits landlords from withdrawing service. Section 114 authorized the commission to conduct suit in the name of the tenant to recover any amount due him under its determination. Section 115 authorizes the commission to prescribe terms of procedure which shall be simple and summary.

Section 116 provides a penalty for a fictitious sale or other device to obtain the use of property in avoidance of the statute.

Section 117 authorizes the commission to prescribe standard forms of leases.

Section 118 forbids the assignment or subletting by a tenant at a rate in excess of that paid by him and authorizes the commission to determine a fair and reasonable rate for such assignment or sublease.

Section 119 repeals the Saulsbury resolution; section 120 makes an appropriation to carry out the provisions of the title.

ARGUMENT.

Part One. The Requirement as to Notice is Constitutional.

I. The requirement that during the emergency period created by the war the owner of any rental property in the District of Columbia desiring possession must give thirty days' notice to the tenant is a mere change in remedy and does not deprive the owner of property.

As heretofore shown, under the law in force in the District before 1864 the summary remedy for possession by the

Maryland act of 1793 could not be availed of unless the landlord gave the tenant thirty days' notice. By the act of 1864, which continued until the present statute, in case of a lease for a definite term, no notice to quit was necessary. Under the Rents act the old law was in effect revived, and the tenant for a definite term was entitled to thirty days' notice to quit.

While this change in the law might have been made without reason, the need for it was apparent. During the emergency every tenant needs at least thirty days within which to move. He would be lucky indeed should he find a new place within that short time. Without this protection he might be led by the landlord to believe that the lease could be renewed on reasonable terms. Then, on the last day of the lease, exorbitant rent might be demanded, with the alternative of immediate eviction.

That this requirement as to notice was merely a change in remedy was ignored by the majority opinion below.

That opinion argues that "the tenant's right of possession terminated on December 31, 1919, that this right of reversion is a property right of which the landlord cannot be divested except by due process of law" (Record, 28).

In the present discussion we need not dispute this assertion. But this statute does not divest the landlord's right of reversion. It merely requires him to give the tenant thirty days' notice of his desire to regain possession.

The landlord had no vested right in the remedy. He is merely entitled to an adequate remedy. That the landlord has an adequate remedy is clear. Concededly the landlord here comes within the class of persons to whom the summary remedy is open. He must, however, give a notice, which all

landlords in his position were required to give prior to 1864. Had he given the notice on December 1st, he would have terminated the tenancy at the time of the expiration of the original lease, and would have been in position to start his summary remedy the next day.

Buying the property after the change in remedy, defendant in error is in no position to complain.

Such a requirement is by no means unusual.

The Delaware Revised Code, 707, section 4, provides:

> "If there be a demise for a period of one or more years, and three months or upward before the end of the term either the landlord do not give notice in writing to the tenant in possession to remove or the tenant do not give like notice to the landlord of his intention to remove from the demised premises, the term shall be extended for another year, for which the tenant shall pay rent, and all stipulations of the demise shall continue in force."

See Thomas *v.* Black, 8 Houston (Del.), 507, Bonsall *v.* McKay, 1 Houston (Del.), 520; Roberts *v.* Grubb, 5 Houston (Del.), 461.

The Oregon law (Oregon B. & C. Comp., sections 5756 and 5757) requires that ten days' notice be given to terminate a tenancy, or in the event the lands are used for agricultural purposes ninety days' notice.

In Rich *v.* Keyser, 54 Pa. St., 86, construing the act of 1863:

> "Where any person in this State having leased or demised any lands or tenements to any person or persons for a term of one or more years, or at will, shall be desirous to have again and repossess such demised premises, having given three months' notice of such

> intention to his lessee or tenant, and said lessee shall refuse to leave, etc., complaint is to be made to a justice of the peace and on the hearing before him it is to be proved that the term is fully ended and that the three months' previous notice had been given,"

the notice given on the day the term ended was held insufficient.

That this change in remedy violates no constitutional right is clear. The law is set forth by Chief Justice Smyth in his dissenting opinion:

> "The requirement with respect to the notice affects the remedy only. It does not touch the contractual rights of the parties. There is a wide difference between the obligation of a contract and the remedy for its enforcement. This has been the law at least since Sturges *v.* Crowninshield, 4 Wheat., 122 (200). In that case Chief Justice Marshall said: 'The distinction between the obligation of a contract and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of a contract, the remedy may certainly be modified as the wisdom of the nation shall direct.' In a later case the same court said: 'But it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligation of a contract if an adequate and efficacious remedy is left.' Antoni *v.* Greenhow, 107 U. S., 769, 774. To the same effect are Tennessee *v.* Sneed, 96 U. S., 69, 74; Wilson *v.* Standefer, 184 U. S., 399, 416; Waggoner *v.* Flack, 188 U. S., 595, 604, and Aikens *v.* Kingsbury, 247 U. S., 484, 488. According to the judgment of Congress the remedy in the

> case before us was modified, but that was legitimate and did not make the act invalid."

See also Bank of Columbia *v.* Oakley, 4 Wheat., 233; Red River Bank *v.* Craig, 181 U. S., 548, 553; League *v.* Texas, 184 U. S., 158; C. & A. R. R. *v.* Tranbarger, 238 U. S., 67; N. Y. C. R. R. Co. *v.* White, 243 U. S., 188.

II. THE RENTS LAW BECAME OPERATIVE AT THE DATE OF ITS PASSAGE, AND APPLIED TO THIS CASE.

Defendant in error in his brief argues that the Rents Act did not become effective until 60 days after the confirmation of the Rent Commissioners, or March 14, 1920, and that it could not affect him.

This objection is now made for the first time (R., 23) and under well-settled principles should not be considered.

There is nothing in the act to indicate that it was not to go into effect at once. The rule with us is that a statute is in force from its date. Matthews *v.* Zane, 7 Wheat., 164, 211; 1 Fed. Stat. Anno., 2 ed., 10.

Counsel relies upon section 119, which repeals the Saulsbury Resolution, to take effect 60 days after the confirmation of the Rent Commissioners first appointed. His argument would have the effect of destroying the statute. Unless the statute is in existence there are no positions to which the Rent Commissioners can be appointed.

The continuance of the Saulsbury Resolution for this limited period has no effect upon defendant in error or his right to obtain his property. So far as he was concerned the Rents Act was not inconsistent with the resolution. It

merely added a requirement that notice be given. Defendant in error was a *bona fide* purchaser and could obtain possession under either law.

If defendant in error had given his 30 days' notice on December 1, he would have been entitled to proceed with the summary remedy on January 2, and his rights thereafter would have been no different from what they were under the old law.

III. HAVING FAILED TO GIVE THE THIRTY-DAY NOTICE, DEFENDANT IN ERROR CANNOT QUESTION THE CONSTITUTIONALITY OF THE REGULATORY PROVISIONS OF THE STATUTE.

A. *Defendant in error does not come within the class affected by the regulatory provisions of the statute and cannot question that part of it.*

The act, Sec. 121, provides that if any portion be held unconstitutional such holding shall not affect any other portion. The change in the law with respect to notice must be upheld even should the regulatory provisions fall. Defendant in error for some reason failed to give the required notice. Concededly he comes within the class entitled to the summary remedy upon giving the notice.

To raise a constitutional question as to the validity of a statute the litigant must be affected and prejudiced by its provisions. Constitutional provisions against the impairment of vested rights and guarantees against the taking of private property without due process of law are for the benefit and protection of those persons only whose rights are affected, and others cannot question statutes as violating those provisions.

Arkadelphia Milling Co. *v.* St. Louis Southwestern R. Co., 249 U. S., 134.

Jeffrey Mfg. Co. *v.* Blagg, 235 U. S., 571, 576.

Plymouth Coal Co. *v.* Pennsylvania, 232 U. S., 531, 544, 545.

Standard Stock Food *v.* Wright, 225 U. S., 540, 550.

One doing a large business cannot say that the statute discriminates against one doing a small business.

Southern Rwy. Co. *v.* King, 217 U. S., 534.

The party seeking to have the statute declared unconstitutional must affirmatively show that he has suffered injury and is prejudiced through the operation of the statute and the application of the law; otherwise the question is not properly before the court and the invalidity of the act cannot be asserted. In Turpin *v.* Lemon, 187 U. S., 51, it is said:

> "This is an effort to test the constitutionality of the law, without showing that the plaintiff had been injured by its application and in this particular, the case falls within the ruling of Tyler *v.* Registration Court Judges, 179 U. S., 405; 45 L. Ed., 252; 21 Sup. Ct. Rep., 206, wherein we held that the plaintiff was bound to show he had personally suffered an injury before he could institute a bill for relief. In short, the case made by the plaintiff is purely academic."

Thus, to raise the constitutional question, defendant in error shows that his legal rights guaranteed by the Constitution are prejudiced by the enforcement of the Rents Act. In considering this issue the grounds are necessarily con-

fined to the particular case presented. In Tyler *v.* Registration Court Judges, 179 U. S., 405, this court, in considering a constitutional question raised by one of the litigants, says (pp. 4098-4099):

> "As we had occasion to observe in California *v.* San Pablo & T. R. Co., 149 U. S., 308, 314; 37 L. Ed., 747, 479; 13 Sup. Ct. Rep., 876, *'the duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it.* * * *'" (Italics supplied.)

In New York *ex rel.* Hatch *v.* Reardon, 204 U. S., 152, Mr. Justice Holmes says (p. 161):

> "The other ground of attack is that the act is an interference with commerce among the several States. Cases were imagined, which, it was said, would fall within the statute, and yet would be cases of such commerce; and it was argued that if the act embraced any such cases it was void as to them, and, if void as to them, void altogether, on a principle often stated."
>
> "But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of the State on constitutional grounds. This limit has been fixed in many cases. It is that unless the party setting up the unconstitutionality of the State law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, *this court does not listen to objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if, for any reason or*

as against any class embraced, the law is unconstitutional, it is void as to all."

"*If the law is valid when confined to the class of the party before the court it may be more or less of a speculation to inquire what exceptions the State court may read into general words, or how far it may sustain an act that partially fails.*" (Italics supplied.)

Collins *v.* Texas, 223 U. S., 288, is directly in point. There the statute established a board of medical examiners and required all practitioners of medicine to receive a license from such board. Certain applicants, as a condition of examination, were required to be graduates of *bona fide*, reputable medical schools. Collins was a graduate of a reputable school of osteopathy. He practised without applying for the license. He was prosecuted for violating the statute. He sought release on *habeas corpus* and appealed from an order of the Texas Court of Criminal Appeals denying the writ. He argued that the statute was unconstitutional and that the board of medical examiners would hold that the school of osteopathy was not a school of medicine. This court held that a school of osteopathy was a school of medicine; that Collins was entitled to a license and presumably would have obtained one had he pursued the statute; that Collins did not come within the class which would be injured by the statute, and that he could not question its constitutionality as applied to others. The court said:

"On these facts we are of opinion that the plaintiff in error fails to show that the statute inflicts any wrong upon him contrary to the Fourteenth Amendment of the Constitution of the United States. If he has not suffered, *we are not called upon to speculate*

upon other cases, or to decide whether the followers of Christian Science or other people might, in some event, have cause to complain." (Italics supplied.)

That the lower courts would have sustained the landlord's right in possession must be presumed.

Had he given the notice, he would have been entitled immediately upon the expiration to bring suit in the municipal court and to recover possession and must have recovered judgment.

B. *The giving of notice would not estop defendant in error to attack the constitutionality of the statute.*

The majority of the court below say that counsel urged that defendant in error should have pursued the remedy prescribed in the statute and if unsuccessful should have appealed. The court then holds that if the landlord should invoke the aid of the statute and suffer defeat before the commission, he would estop himself to seek further relief on the ground of unconstitutionality of the act (R., 28)

The court entirely misconceived our contention. The statute gave defendant in error no new remedy, and he was not called upon to invoke relief under it. As the owner of property then under rental who desired to occupy it himself, the statute merely required the giving of a thirty day notice to the tenant. After such notice the landlord invoked *not the aid of the Rents Act*, but the aid of the District Code, giving a summary remedy for possession.

It is true that if the tenant questioned the good faith of the notice or the validity of its service the tenant—not the landlord—might proceed before the Rents Commission for a

determination of those questions. No such contention was made here.

In such case the landlord does not invoke the aid of the statute. He is brought before the commission as a defendant. The rule is settled that a defendant is not estopped to later question the constitutionality of an act by proceeding with his defense after his objection has been overruled.

The cases cited by the court below are cases where a person who has invoked the aid of an unconstitutional law has received such benefit therefrom as to make him liable to someone else on the theory of implied contract. See Shepard *v.* Barron, 194 U. S., 553. The case at bar is not of that character. By giving a notice to quit, the landlord accepts no benefit, nor does he seek the aid of the Rents Act.

Part Two. The Regulatory Provisions of the Act are Constitutional.

I. They constitute a valid exercise of the war powers of Congress.

The first title of the act here involved, amending the Lever Act, was in this court in a number of cases argued in October. The briefs of the Solicitor General in those cases (particularly U. S. *v.* Cohen Grocery Co., No. 324) are so full and convincing that a short statement here is sufficient.

As said by this court in Stewart *v.* Kahn, 11 Wall., 507, the war power "is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate re-

newal of the conflict *and to remedy the evils which have arisen from its rise and progress.*" (Italics supplied.)

That the war was still in existence when this statute was passed is clear from the decisions in Hamilton *v.* Kentucky Distilleries Co., 251 U. S., 161, sustaining the War Time Prohibition Act, and Ruppert *v.* Caffey, 251 U. S., 264, sustaining the National Prohibition Act, approved October 28, 1919, nine days after the passage of this statute.

"The complete and undivided character of the war power of the United States is not disputable" (Northern Pacific Rwy. Co. *v.* North Dakota, 250 U. S., 135, 149).

That the shortage of houses in the District of Columbia is one of the evils which have arisen from the rise and progress of the war we have already shown, and the statute (Sec. 122) so declares.

The war power is complete and ample to justify whatever legislation is necessary to bring into operation the full resources of the country.

The war power is subject to applicable constitutional limitations (Hamilton *v.* Kentucky Distilleries Co., 251 U. S., 156).

The draft law appropriated the liberty and lives of the citizens coming within its terms. This, of course, was without compensation. The law was sustained (Selective Draft cases, 245 U. S., 366).

The property of a citizen is neither more sacred than his life or liberty, nor is it better protected by the Constitution.

The men having been taken by law to do the fighting, a great mass of legislation was directed to utilizing every ounce of energy in the country to making effective that

fighting power. It was sometimes necessary to actually *take* the private property of the citizen. More often it was sufficient to *regulate the use* of that property.

In the first case the owner surrendered his property and was paid for it. In the other, he continued to use his property within the regulations, but was not paid for any loss he might suffer nor for failure to obtain a greater profit. In such case, however, his property was not *taken* and he was not entitled to compensation.

The Government's main effort was to secure the fighting power and the munitions and equipment of war. But in taking the men and providing for the acquisition of munitions of war the business of the country was found to be so interrelated that it became necessary to some extent to control or regulate all business.

The railroads, the highways of commerce, were taken over by the Government.

It early became necessary to control the supplies of food and fuel. The Lever Act of August 10, 1917, of which the present statute is an amendment, was one of the most important regulatory statutes. It provided for the control of practically all the necessities of life, but without taking property. This control became essential to the very existence of the nation.

Without fuel the factories and transportation facilities would stand still. Fuel was private property, but so essential to the winning of the war that the Government necessarily controlled, not only the price of fuel, but even the persons who might buy and sell it.

Coal was regulated in the most minute degree. Preferences were established so that essential industries might con-

tinue. Manufacturers whose industries were not essential in many cases were compelled to close because of inability to get fuel. It made no difference that they might have contracts for the delivery of the fuel.

Dealers were licensed and no others could buy or sell coal. The prices which they might pay and receive were fixed. Farmers who dug coal on their own property in the winter time were indicted for receiving more than the price fixed. Dealers who endeavored to stimulate production by paying higher prices were indicted and punished.

It is difficult to imagine a greater invasion of private property. But during the emergency this property was so important to the public that the Government was justified in regulating the price and its use.

The control over articles of food under this statute was just as great.

The prices of staples were fixed, preferences were established, and a consumer was punishable if he hoarded necessaries.

Bakers were forced to change their recipes and to substitute other ingredients for part of the wheat flour.

All these articles of food were private property. But there was danger of starvation among our allies and we were put upon short rations in order that they might live.

Some crops were either bought in their entirety by the Government or the Government allotted what it did not need to essential industries. This was true of the wool clip of 1918.

The Council of National Defense, the Federal Trade Commission, the Food Administration, the Fuel Administration, and various bodies under the several departments engaged

in an enormous amount of price fixing during the emergency. A full and interesting description of these activities is set forth in Government Control Over Prices, by Paul Willard Garrett, War Industries Price Bulletin No. 3, 1920.

If during the war the Government may lawfully take the liberty of its citizens, compel them to risk their lives for the public defense, and regulate both the price and the distribution of fuel and food, may it not also regulate the prices of shelter at the seat of government?

II. During the emergency caused by the war Congress, in the exercise of its plenary police power in the District of Columbia, may regulate rents of all real property devoted to rental purposes.

For the moment we lay aside all questions of detail. That the entire scheme devised by Congress is constitutional we believe is clearly shown by the convincing brief filed herein by Mr. Glassie and the Solicitor General. We shall not attempt to add anything to their discussion of the objections to the procedural sections. The statute, properly construed, is valid.

We shall confine ourselves to the one question of constitutional power to regulate rents during the present emergency. Indeed, even this seems unnecessary, for we cannot hope to add anything to what has been so ably stated by them and by Mr. Guthrie and his associates in the brief for the appellee in support of the New York statutes filed in Brown Holding Company *v.* Feldman, No. —.

While the majority of the court below thought the statute

was invalid as to different sections on several grounds, on the present point their position seems to be this: An individual who has purchased a reversion to real property while under rental for a fixed term has the absolute, uncontrollable right to oust the tenant instantly at the expiration of the time and to immediately regain possession. He may keep the property idle or rent it to whomsoever he pleases at whatever oppressive rate he may fix. No economic or other condition can justify the slightest modification of these rights. There may be war, the tenant may be drafted and be abroad fighting for the landlord, the tenant's family may all be sick of influenza and accommodations in hospitals or other shelter impossible. Under these circumstances the landlord may say to the stricken wife and mother, "Pay me a rent ten times greater than the old or I will put you and your children in the street." The legislature is so impotent that it cannot fix the return which this landlord may receive from any tenant of this property; it cannot say that if this property continues to be rented the present tenant shall have the first opportunity; it cannot stay eviction until the soldier has opportunity to return; and, finally, it cannot even require the landlord to give a month's notice of his intention to evict his tenant.

This is not an isolated case. In substance it is true of thousands of tenants in the District of Columbia, of a hundred thousand tenants in New York city, and probably of a million tenants in the entire country.

We do not believe that government is powerless in such an emergency. The answer suggested by the court below that government might condemn such property is not sufficient, for, according to their own construction, rental of that prop-

erty to others would be a private use. If a use is not sufficiently public to justify regulation, it will not authorize condemnation.

A consideration of our law of real estate, of the numerous instances in which legislatures have regulated the use of property, both real and personal, and the principles upon which these statutes are based will sustain, from every view point, the right to regulate rental property in the District.

In all instances where regulation has been applied, the property of the owner is private, and the use is private. But for reasons of necessity and self-protection the people fix the charge of the owner.

The owner may have a monopoly, either legal or virtual. Under such circumstances the law has never hesitated to protect the many from oppression and extortion at the hands of one or the few. There may not be a monopoly, but the economic circumstances of the parties are so dissimilar that the law will regulate their contract. The necessitous borrower will pay any rate of interest. The workman needs protection as to payment of wages; he requires payment at short intervals and in currency; his wife may need protection against the assignment of his wages.

Finally, the particular business may rise to such supreme importance that the interest of the public superinduces the right to control. In England and the colonies our ancestors applied this principle to practically every calling from that of innkeeper to that of barrister; the rates which might be charged in most occupations were regulated. Competition becoming effective, regulation in most callings was suspended, but the principle continued in existence ready to be applied when necessary. In recent years it has been applied

to hotel keepers, to bakers, to carriers, to distributors of water, light, heat, and fuel, to lenders of money, to warehousemen, storage warehouses, to insurance, both fire and fidelity, to laundries, cotton gins, to purses at horse races, and to sales of food, fuel, and other necessaries of life.

In the District of Columbia there is today a virtual monopoly of real estate; the tenant is not on a parity with the landlord, but must pay whatever rent is demanded; guest never was more at the mercy of his host; and a fair distribution of shelter at a reasonable price in the District of Columbia is as important to the national and local governments as was ever the distribution of water, gas, electricity, or coal to the householder. An individual in Washington even today may walk; he may heat by wood or oil; he may read by lamp; he may wash his clothes at home; he may go without insurance—but he cannot do without shelter nor can he find any substitute.

A. UNDER OUR LAW THE OWNER OF REAL AND PERSONAL PROPERTY NEVER HAD AN ABSOLUTE RIGHT TO USE HIS PROPERTY AS HE PLEASED.

1. *The owner's rights over real property are not absolute.*

Under feudal tenures the owner of real estate in fee simple, while he has the highest title of which real estate is capable, is still but a tenant of the sovereignty.

Theoretically the owner's title extends from the center of the earth to the heavens, but a fundamental maxim of our law is that the owner of property must so use it as not to injure another.

Regulation has so limited the actual enjoyment by the owner of his property that his lawful right is but a fraction of the claim advanced by the court below. Particularly is this true where the property is in a city.

Unimproved real estate is not free from such regulation. If stagnant water collects there may be a nuisance and the owner may be compelled to fill the lot. He may be forced to build fences (Atlantic Coast Line *v.* Goldsboro, 232 U. S., 561). If he fails he may be made liable for injuries to cattle wandering on his land. Fences of a certain height erected maliciously may be forbidden (Rideout *v.* Knox, 148 Mass., 368). Statutes compelling the removal of snow and ice from abutting sidewalks are not uncommon.

When the owner desires to build, his action is controlled in every direction.

He may not start his improvements without permission from the proper officer.

A frame structure may be prohibited; the thickness of the walls and strength of pillars, the height of the building, the nearness to the sidewalk, all may be regulated for the safety of the community. An adjoining owner may be permitted to build a party wall on his land and thus deprive him of several inches or feet. He may be forbidden to cover the entire lot with his structure, be forced to leave certain windows, halls, and exits; running water, bath-tubs, and toilets are compulsory. Fire-escapes, elevators, and air-shafts may be compelled.

When the owner completes his structure and begins to use it he may be forbidden the use of cellars for dwelling purposes and may not keep animals in the premises. He may not overcrowd the building, but each occupant may be allot-

ted a certain amount of air space. Modern zoning statutes forbid business properties within residential sections, and even forbid certain classes of business within business sections.

Thus the owner of real estate may be compelled to fill it in, and to permit adjoining owners to encroach upon his lot. If a highway becomes blocked, passers-by may travel over his land. He may be forced by a majority of his neighbors to pay for water mains, sidewalks, and other improvements which he did not desire. He may not build over the entire area of his lot. He may not build higher than the width of the street, or, if the property is in an alley, he may not build for residence purposes. In every direction the character of his improvements is controlled to the minutest degree.

And finally if his building is unsafe it may not be used at all. To prevent conflagration it may be wholly destroyed for common protection.

If his property is in certain sections, he may not use it for garage, theater, or certain other purposes. He may not erect the kind of billboard which he desires (St. Louis Poster Company *v.* St. Louis, 249 U. S., 269; Freund, Police Power, sections 118, 127, and 128).

Control is not limited to urban property. The owner of real estate within a certain distance of a water-shed who cuts his timber may be compelled to remove or burn that part not used for commercial purposes (Perley *v.* N. C., 245 U. S., 910). If he owns a coal mine he may be compelled to leave necessary boundary pillars of coal (Plymouth Coal Co. *v.* Pa., 232 U. S., 531).

In each of these instances the use of the land is impeded; in some a portion of the land is actually taken by others.

and in some the value of the property is greatly lessened, and under some statutes, if a man's real property is used for illegal purposes, he may be deprived of the use of the property for a definite period, and this even though the owner was innocent of wrong-doing.

2. *The control over personal property is just as great.*

If a man lends money, the interest or return which he may receive is regulated. If he is a baker, his prices may be fixed.

The use which he may make of animate property is limited. He may not drive beyond certain speeds; he may not keep or leave his property on certain places; he must not treat his animals cruelly; he must keep his animals from doing injuries to the person or property of others; he may not shoot wild animals or birds even upon his own land.

Here, also, if his property be devoted to unlawful uses, even by a third party, it may be taken wholly from him. Goldsmith Grant Co. *v.* U. S., 214 this term, decided January 17.

3. *The owner's right to transfer his property is greatly limited.*

As to real estate, we have always limited the disposition of it upon the death of the owner. The wife has always been protected and sometimes the children. The property may not be tied up beyond a certain period.

The method of transfer was always carefully guarded. While livery of seisin was evaded by conveyances under the

statute of uses, these conveyances always required certain formalities, and others were added by the statute of frauds and recording statutes.

As to personal property the rights of owners and purchasers because of the greater danger of fraud were even more circumscribed.

Conditional sales must be in writing and recorded. So must mortgages of both real and personal property.

If the purchaser of personal property leave it with the vendor, he may lose it altogether.

If a merchant desire to sell his goods in bulk, he must carefully follow a course outlined by statute. Lemieux *v.* Young, 211 U. S., 489.

So, if a promoter desire to sell stocks and bonds he must submit to a rigid scrutiny at the hands of a public official. Hall *v.* Geiger Jones Co., 242 U. S., 539.

In Nebraska, if one mortgages his personal property he may not sell it without the written consent of the mortgagee. St. *v.* Hebenbrand, 62 Nebr., 136.

In Kentucky, one may not lawfully buy tobacco from a grower who pooled it, unless the written consent of the selling agent of the pool be first obtained. Com. *v.* Hodges, 137 Ky., 233.

In Missouri, grain sales must be made on the basis of actual weight. House *v.* Mayes, 227 Mo., 641.

In South Carolina, the seller of cotton may not charge for bagging and ties if they do not exceed 6 per cent of the weight. State *v.* Mullins, 87 S. Car., 512.

Salesmen engaged in interstate commerce may not bribe prospective customers by giving them cigars, meals, or theater tickets. Fed. Trade Com. *v.* Fed. Chemical & Color Co., 2 Fed. Trade Com., Dec. 71.

In North Dakota, lard, when not sold in bulk, must be in containers of specified weights. Armour *v.* N. Dakota, 240 U. S., 510.

Articles sold in interstate commerce must be accurately marked as to weight.

B. IF DURING THE EMERGENCY THE BUSINESS OF RENTING REAL PROPERTY IN THE DISTRICT OF COLUMBIA HOLDS SUCH A PECULIAR RELATION TO THE PUBLIC INTEREST AS TO JUSTIFY IT, THERE WILL BE SUPERINDUCED UPON THAT BUSINESS THE RIGHT OF PUBLIC REGULATION.

The police power which limits and regulates the use of the owner's property for the most personal and private purposes, for the benefit and protection of the community, as already shown, permits the Government in certain cases to even regulate the price which the owner of the property may charge for its use or the price which he may charge for services rendered.

As said by Mr. Justice McKenna in German Alliance Ins. Co. *v.* Lewis, 233 U. S., 389, 411, quoting Judge Andrews in Budd *v.* New York, 117 N. Y., 27:

> "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation."

It is not necessary to determine whether every business, every trade or calling may be so regulated. The only question is whether during the emergency the present business comes within the principle laid down. A consideration of other regulation will show that it does.

The historical introduction to Beale & Wyman's Railroad Rate Regulation contains an interesting résumé of the principle and its application from the earliest times.

> The mediæval system involved almost universal regulation of all the doings of men and therefore its commercial policy was almost completely restrictive. The system was a consumer's policy by reason of its limitation of prices. (Sec. 2.)
>
> The advances of the modern competitive system gradually worked the destruction of the mediæval organization of industry. A period of free competition is now considered to be for the best interest of society. In all times in economic history both restriction and freedom are to be found in the law. In one epoch there is much legal limitation with little legal freedom left; in another age there is almost universal competition with some franchise to be found. The rule will generally hold true that the more the natural laws of competition regulate services and prices, the less the State need interfere in these respects; but conversely when competition ceases to act efficiently, *State control becomes necessary.* (Sec. 7.)
>
> During this transitional period when the mediæval system of customary laws ceased to operate effectively, Parliament itself frequently regulated the prices of necessaries of life by direct legislation. The great staples, like wool and food, were habitually regulated in this way, and the employment and the price of labor was a subject of statutory provision. Thus, in 1266, Henry III, after reciting former statutes to the same effect, regulated the price of bread and ale according to the market. In 1337 it was made felony to export wool, and the importation of cloth was forbidden. In 1349 all laborers were

obliged to serve for the customary wages, and "butchers, fishmongers, regrators, hostelors (*i. e.*, innkeepers), brewers, bakers, poulterers, and all other sellers of all manner of victuals," were bound to sell for a reasonable price. These statutes continued in force throughout the Middle Ages, and until after the settlement of America. (Sec. 8.)

This legislative power the colonists brought to America with them. In a new colony life is a serious thing, the necessaries of life are scarce, and the needs of the public are pressing. The conditions are ideal for a distressing cornering of the market by merchants. Accordingly, though most of the statutory regulations of trades and prices had either been repealed or had become obsolete in the mother country, the colonies at an early time passed statutes regulating the prices of staple commodities. Thus in Massachusetts in 1635 shopkeepers and merchants were forbidden to charge excessive prices. In Plymouth colony the price of boards was fixed in 1668. Corn and tobacco, beer and bread, beef and boards, all that was most important for the colonists to have was regulated as a matter of course by the assemblies of the times. (Sec. 9.)

This power of regulation continues and is not affected by the general guaranties of individual liberty contained in our constitutions; with changed economic conditions the power applies to new callings and new matters, and the principle has been utilized as never before. It depends largely upon the opinion current at the time how far this law should be extended. (Secs. 10, 11.)

It is almost a truism that the spirit of the age moulds the law. Nowhere is the influence of the spirit of the time on the common law more evident and more potent than in this question of the regulation of common callings. (Sec. 18.)

> The test here suggested is that whether a business is public or not depends upon the situation of the public with respect to it. Wherever there is in private hands substantial control of a public necessity it may be well said that the public has now an interest in the conduct of these businesses by their owners. Since these agencies are carried on in a manner to make them of public consequence, they have become affected with a public interest. Therefore, as the old books say, having devoted their property to a use in which the public has an interest, they in effect have granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created. (Sec. 27.)
>
> The hypothesis here put forward is that whether a business is public or not depends upon the situation of the public with respect to it. Are there enough of such purveyors to serve the public? or are there, for permanent reasons, never enough? If so there will be virtual competition; if not, there will be virtual monopoly. (Sec. 35.)

The police power is not subject to any definite limitation but is coextensive with the necessities of the case in the safeguarding of public interests (Camfield *v.* U. S., 167 U. S., 518).

It embraces regulations designed to promote the public convenience or general prosperity, as well as regulations designed to protect the public health, public morals or public safety (C., B. & Q. R. R. Co. *v.* Illinois, 200 U. S., 592).

One of the earliest illustrations is the matter of interest. At one time forbidden, the maximum rate now is universally fixed. If a man does lend his money, he may not take more

than that rate, he is deprived of any return beyond that rate. The contract is purely a private one and this additional sum does not go to the Government but remains with the borrower. The law is for the benefit of each borrower, but they in effect make a large part of the public.

Another early illustration is the innkeeper. Roads were bad and infested with robbers so that traveling after dark was exceedingly dangerous. The traveler was forced to stop at the nearest inn at the end of the day. He must pay whatever price was demanded. But because of his necessity, the law regulated the innkeeper's charge, both for food and lodging. Between the host and the guest the contract was private. The property of the host was given to the guest for less than he would have paid. The innkeeper was entitled to a reasonable charge, but the public reserved the right to determine what that reasonable charge should be.

The principle was applied by England to every occupation whenever deemed necessary.

In our colonies the rule was followed and rates were regulated to as great degree as ever in England.

The competitive system thereafter for years rendered regulation unnecessary in most callings. Yet when economic conditions so changed that it was necessary to again apply the principle to old callings or to new ones, in each instance the owners of the property or the persons engaged in the business vigorously opposed the law and contended that it was unconstitutional.

In the various States the principle has been applied to those businesses, industries and occupations closely affecting the people of that State. Whenever economic conditions have required, the people have not hesitated to exercise the police

power and to protect themselves by regulating the rates and method of performing the business.

The leading case in the United States is Munn *v.* Illinois, 94 U. S., 113, decided in 1876. There, as a result of the Granger movement, the constitution of Illinois authorized the regulation of grain elevators. The statute of 1871 regulated rates to be charged by owners of such elevators for elevation and storage of grain. Chicago had become the greatest grain market in the world. Practically all grain going to market necessarily went through the elevators. Those in Chicago were controlled by a few owners and the sites upon which they could be constructed were limited in number. Both the farmers and consumers were compelled to pay tribute to the owners. The latter had a virtual monopoly. Elevator buildings were on privately owned land and were private buildings. The grain was privately owned, and in each case there was a private contract. Yet it was as important to the people of Illinois to regulate the elevator charges as the rates of interest or the hotel keeper's charge.

In sustaining the statute this court said, through Mr. Chief Justice Waite:

> "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. 'A body politic,' as aptly defined in the preamble of the constitution of Massachusetts, 'is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.' This does not confer power upon the whole people to control rights which are purely and exclusively private (*Thorpe* v. *R. & B.*

Railroad Co., 27 Vt., 143); but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non lædas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License cases*, 5 How., 583, 'are nothing more or less than the powers of government inherent in every sovereignty. * * * that is to say * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all of these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress, in 1820, conferred power upon the city of Washington 'to regulate * * * the rates of wharfage at private wharves, * * * the sweeping of chimneys, and to fix the rates of fees therefor * * * and the weight and quality of bread' (3 Stat., 587, sect. 7); and, in 1848, 'to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by

cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers' (9 *id.*, 224, sect. 2).

"From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation.

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris* (1 Harg. Law Tracts, 78), and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control" (124-126).

> "When private property is devoted to a public use, it is subject to public regulation" (130).

The court then considers the facts and holds that the business there carried on thus comes within the operation of this principle.

In the present case the following sentence from the dissenting opinion of Mr. Justice Field is interesting:

> "The public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, anything like so great an interest; and, according to the doctrine announced, the legislature may fix the rent of all tenements used for residences, without reference to the cost of their erection."

Following this case when the Legislature of Illinois reached the conclusion that the control of refrigeration storage-houses was necessary, such control was sustained (State Commission *v.* Monarch Refrigeration Company, 267 Ill., 534).

Some 18 years later economic conditions in New York became such that there similar legislation was found necessary. The Munn case was followed and reaffirmed (Budd *v.* New York, 143 N. Y., 517; 117 N. Y., 1; 5 L. R. A., 559). The opinions in both courts laid stress upon the magnitude and virtual monopoly of the business. They answer the dissenting opinion in the Munn case and show that the principle is not based upon the ground of special privilege conferred.

Finally, in Brass *v.* Stoeser, 153 U. S., 391, 410, where a similar law of North Dakota as applied to small country

elevators, was sustained, this court followed the prior decisions and held that the principle was not confined to cases of monopoly.

Finally, in German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389, this court sustained a statute of Kansas authorizing the regulation of fire-insurance rates.

Referring to Munn *v.* Illinois, the court said:

> "That the case had broader application than the use of property is manifest from the grounds expressed in the dissenting opinion. The basis of the opinion was that the business regulated was private and had 'no special privilege connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business.' The argument encountered opposing examples, among others, the regulation of the rate of interest on money. The regulation was accounted for on the ground that the act of Parliament permitting the charging of some interest was a relaxation of a prohibition of the common law against charging any interest, but this explanation overlooked the fact that both the common law and the act of Parliament were exercises of government regulation of a strictly private business in the interest of public policy, a policy which still endures and still dictates regulating laws. Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—State and national—has pressed on in the general welfare; and our reports are full of cases where instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say

that rights were restrained or their constitutional guaranties impaired.

"*Munn v. Illinois* was approved in many State decisions, but it was brought to the review of this court in *Budd v. New York*, 143 U. S., 517, and its doctrine, after elaborate consideration, reaffirmed, and against the same arguments which are now urged against the Kansas statute. Nowhere have these arguments been, or could be, advanced with greater strength and felicity of expression than in the dissenting opinion of Mr. Justice Brewer. Every consideration was adduced, based on the private character of the business regulated and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations urged did not prevail. Against them the court opposed the ever-existing police power in government and its necessary exercise for the public good and declared its entire accommodation to the limitations of the Constitution. The court was not deterred by the charge (repeated in the case at bar) that its decision had the sweeping and dangerous comprehension of subjecting to legislative regulation all of the businesses and affairs of life and the prices of all commodities * * * (408-410).

"The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may arise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in *People v. Budd* (117 N. Y., 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege

> conferred by the public upon those affected cannot be supported. *'The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.'* Is the business of insurance within the principle? It would be a bold thing to say that the principle is fixed, in elastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today" (411).

It is interesting that Mr. Justice Lamar in his dissenting opinion argues that the principle followed by the majority of the court would justify the regulation of rents. He says:

> "And inasmuch as the prices of agricultural products are dependent on the price of land and labor, and as the price of labor is closely related to the cost of rent and food and clothes and the comforts of life, there would be the power to take the further step and regulate the cost of everything which enters into the cost of living" (439).

He also argues that by a parity of reasoning the rates of guaranty and fidelity insurance may also be regulated. The State of Nebraska, following this decision, has regulated fidelity insurance and the rate has been sustained (*State v. Howard*, 96 Nebr., 293).

The elevator cases illustrate that the State legislatures have applied this principle to economic conditions affecting their own people and industries. Illinois not only is a great grain-

producing State, but has the largest grain market in the world. Millions of bushels of grain annually pass through the Erie canal. North Dakota is a large grain-producing State.

Kentucky has applied the principle to protect the tobacco growers. Nash *v.* Page, 80 Ky., 547, sustained the right to regulate the price for storing tobacco. Cain *v.* Hodges, 137 Ky., 244, sustained the right to punish the buyer or grower in case where the grower, having pooled his tobacco crop, sells it without the written approval of the selling agent of the pool. Kentucky sustained even a statute permitting the racing commission to fix the minimum purse which may be offered at a horse race (Douglas Park Jockey Club *v.* Talbott, 173 Ky., 685).

An Alabama statute forbidding the transportation at night of cotton in the seed in two certain counties was held valid as an exercise of police power to regulate traffic in the staple agricultural product of the State "so as to prevent a prevalent evil which, in the opinion of the law-making power, may have done much to demoralize agricultural labor and destroy the legitimate profits of agricultural pursuits" (Davis *v.* State, 68 Ala., 63, approved in Budd *v.* New York, *supra*, 539).

In South Carolina, a statute forbidding the seller of cotton to charge for ties and bagging if the latter did not exceed 6 per cent of the weight was held constitutional. "It cannot be doubted that the legislature can interfere with the lawful acts of individuals or the mode in which private property shall be enjoyed if the same affects the public interests or puts one class in a position to oppress or defraud another class" (State *v.* Mullins, 87 S. C., 510, 512).

Ohio makes it unlawful to permit the flow of natural gas uncontrolled for a longer period than two days (Ohio Oil Co. v. Indiana, 177 U. S., 190).

New York, in order to protect its mineral springs, prohibits the owner of the surface land by pumping on his own land to deplete the subterranean supply of water common to him and other owners (Lindsley v. Natural Carbonic Gas Co., 220 U. S., 61).

Wyoming undertook the preservation of natural gas by forbidding, as to wells within ten miles of towns or industrial plants, the consumption of gas without the heat therein contained being fully applied and utilized (Walls v. Midland Carbon Co., No 219, this term, decided December 13).

Idaho forbids the grazing of sheep on public lands within two miles of the lands of another (Bacon v. Walker, 204 U. S., 311).

Florida and Washington impose a special license tax upon merchants using peddler-clearing coupons and trading stamps (Rast v. Van Deman, 240 U. S., 342; Tanner v. Little, *id.*, 369).

A number of the States have deemed it necessary to abolish many of the common-law rules of liability and to make the employer absolutely responsible for injuries occurring to employees. The rights and duties of both employer and employee are regulated to the minutest degree.

Applying the same principle, for the protection of the people, States have authorized the use of public moneys for purposes theretofore left to private enterprise.

Maine has authorized municipalities to establish public yards for the sale of wood, coal, and other fuel to the inhabitants at cost (Jones v. Portland, 245 U. S., 217).

North Dakota has authorized the lending of money to its citizens for the construction of homes. Green *v.* Frazier, 253 U. S., 233.

Besides thus regulating the use of property by the owner, legislatures in many instances, owing to the necessities of their soil or climate, or for other reasons, have actually taken property from one individual and given it to another for his own use upon the payment of reasonable compensation.

In Clark *v.* Nash, 198 U. S., 361, the Utah statute permitted Nash to condemn a right of way enlarging a ditch across Clark's property to convey water to Nash's land for irrigation purposes. This court said that the validity of the statute might depend, among other considerations, "upon whether each owner of land or mines could be in fact furnished with the necessary water in any other way than by the condemnation in his own behalf" (368).

In Strickley *v.* Highland Boy Gold Mining Co., 200 U. S., 527, a statute authorizing the mining company to condemn a right of way for an aërial bucket line across Strickley's placer-mining claim was sustained.

In Offield *v.* N. Y., N. H. & H. R. R. R. Co., 203 U. S., 372, 377, a Connecticut statute authorized the railroad company to condemn two shares of stock, held by Offield, in one of its subsidiary lines.

In Noble State Bank *v.* Haskell, 219 U. S., 104 and 575, the State insurance law compelled every bank to contribute to the insurance fund. Following the cases just cited this court said:

> "It is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is private use" (110).

In Perley *v.* North Carolina, 249 U. S., 510, the statute required owners of land within 400 feet of a watershed held for water supply of a city, when cutting their own timber to remove or burn tree tops, boughs, laps, and other pieces not used commercially.

The State legislatures during the emergency which prompted the legislation here in question adopted laws very closely resembling this one.

Indiana has created a coal and food commission with power to regulate the prices which may be charged for coal. This statute has been sustained by the United States district court (American Coal Mining Co. *v.* Special Coal & Food Commission of Indiana, 268 Fed., 563, opinion by Circuit Judge Baker).

Oklahoma has authorized the Corporation Commission to fix rates of public businesses and the statute has been applied to a laundry (Oklahoma Operating Co. *v.* Love, 252 U. S., 331).

Wisconsin has passed a statute authorizing its State Railroad Commission to regulate rents. In many respects it is similar to our law.

New York has also undertaken to regulate rents. While the matter is handled somewhat differently, the fundamental aspect is the same. Only just and reasonable rents can be collected. The statutes have been sustained by the United States District Court for the Southern District of New York, three judges sitting (Marcus Brown Holding Co. *v.* Feldman, — Fed., —).

C. THE BUSINESS OF RENTING PROPERTY IN THE DISTRICT OF COLUMBIA DURING THE EMERGENCY HAS ARISEN TO SUCH PUBLIC IMPORTANCE THAT THE PRINCIPLE MAY BE APPLIED.

1. *The legislature has declared that the conditions are such as to require the application of the principle and its decision is binding.*

In Munn *v.* Illinois, 94 U. S., 132, this court said:

> "For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could we must presume it did."
>
> Bast *v.* Van Deman, 240 U. S., 365.

2. *The legislative determination is in strict accord with the facts.*

From the facts set forth and those which are judicially known to the court, it is difficult to conceive of a case where regulation is more needed. There is a virtual monopoly of rental property in the District of Columbia. There is a great disparity between the economic relations of the owners and tenants; there is serious danger of oppression and extortion; the economic remedy of competition cannot be made effective for years; lack of regulation will result in serious injury to the health, safety, morals, order, and welfare of the community.

One of the earliest instances of regulation is that of the inn keeper. There is no difference in principle between the early inn and the modern hotel. In many instances today the hotel is combined with the apartment-house. There is no difficulty in extending that doctrine to large apartment-houses and office buildings. They are erected for the purpose of selling space, light, and heat to members of the public generally. Such buildings plainly are devoted to a public use. Most business is carried on and an increasingly large proportion of the population is housed in them. And as to the dwelling, whether large or small, there is no difference in principle when the owner devotes it to rental.

The language of Judge Hough in sustaining the New York statute is pertinent:

> "The business of renting out living space is quite as suitable for statutory regulation and as much affected with a public interest as fire insurance and trading stamps" (Brown Holding Co. *v.* Feldman. — Fed., —).

3. *The legislative determination is amply supported by a large mass of public opinion.*

The shortage of housing is world-wide. Other countries have preceded us in seeking relief.

As early as December 29, 1915, George V, c. 66, the Parliament of New South Wales created a Fair Rents Court. England and its colonies, France, Spain, and Germany have all sought relief. A full statement of their legislation is contained in the brief for the appellee in Brown Holding Co. *v.* Feldman, and in the brief of the Government filed herein.

Various States of the Union, also, have endeavored to protect their people.

Wisconsin has given to its Railroad Commission the authority to regulate rents. New York has passed a number of statutes. They include the regulation of rents through the courts. They have been sustained by the United States District Court for the Southern District of New York in the case just mentioned and which is now before this court. The statutes are fully outlined in the briefs in that case and in the brief of the Government here.

Maine, Massachusetts, and New Jersey have also attempted to some extent to alleviate the situation.

The action of Congress is not novel. It is based upon ancient principle, and is supported by the thoughtful acts of the legislature and a large body of current public opinion.

4. *The present emergency may be compared to that existing when the Adamson law was passed.*

This striking illustration of the supreme power of government to protect itself is closely analogous.

Because of the inability of the railroads and their employees there was threatened a strike which would paralyze commerce, and might result in the destruction of business and even starvation. The majority of this court held that in this emergency, Congress had power to prescribe a standard of minimum wages to be in force a reasonable time. The statute was sustained, whether viewed as a direct fixing of wages to meet the absence of a standard between the parties or whether as a provision for compulsory arbitration (359).

Here, a grave crisis has arisen. By reason of the war it-

self there is a shortage of housing. The owners assert the right to eject their tenants and, if they please, keep their property idle; they also assert the right to rent to other tenants at exorbitant and oppressive prices. The crisis interferes with the functioning of the Government itself and imposes grave consequences upon the people. May not Congress, during this emergency, brought on by the war, fix reasonable prices and provide that the property shall not be kept idle?

If the return from personal property or money can be regulated, how can that be differentiated from regulating the return from real property? Circuit Judge Baker, in delivering the opinion in American Coal Mining Co. *v.* The Special Coal & Food Commission of Indiana, *supra*, has this to say:

> "Take the case of the lender making a loan to a man at usurious interest. Now, what is a loan? A loan is really a sale. Title passes at once. Money is a commodity. Bankers buy and sell money. Now, here is one line of business that never has depended, as a basis for control upon the power of eminent domain, or a public service. It is a private business. Nothing could be more private than the pawnbroker's business, and yet, from the time immemorial, it has been unquestioned that the power existed to regulate that business by fixing the prices for money. I am unable to distinguish the underlying principle in that case from this, or from the statutes regulating rentals."

III. PROPERLY CONSTRUED, THE PROCEDURAL PROVISIONS OF THE STATUTE ARE CONSONANT WITH DUE PROCESS OF LAW.

The numerous objections made by the court below and counsel for defendant in error are so carefully considered

and ably refuted by the brief of the Solicitor General and Mr. Glassie that we refrain from again discussing those points. Supp., 61 to 97.

Conclusion.

It is respectfully submitted, therefore, that during the emergency Congress has the right to require a thirty days' notice to quit as to all tenants, and to regulate rents of all property devoted to rental purposes in the District of Columbia; that the present statute is a valid exercise of that constitutional right; that it does not take private property; that the rights of defendant in error were in no way invaded by the present statute, and that the regulatory provisions are consistent in all respects with the due process of law and all constitutional requirements.

To adopt the language of Chief Justice Marshall in McCulloch *v.* Maryland, 4 Wheat., 316, 421, the end here is legitimate and the means are reasonably adapted to that end.

The judgment below should be reversed with instructions to deny defendant in error's motion for judgment.

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JESSE C. ADKINS.
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APPENDIX A.

Thompson's Digest of the Laws of the District of Columbia, page 281 *et seq.*, Quoting the Maryland Act of 1793.

Tenant Holding Over.

In all cases where land, tenements, or messuages are let or leased for one or more years, or at will, and the lessor or lessors, their heirs, executors, administrators or assigns, shall be desirous to have again and repossess the said lands, tenements or messuages, after the expiration of the term of estate for which they were demised, let, or leased and for that purpose shall give notice in writing to the tenant or tenants in possession to remove from, and quit the same; if the said tenant or tenants in possession, shall refuse to comply therewith, within one month after such notice (*a*) and upon the end and determination of the said lease, or estate, upon complaint thereof made by the said lessor or lessors, his, her or their heirs, executors, administrators or assigns, to any two justices of the peace of the county wherein the lands, tenements or messuages are situate, and upon due proof made before them, the said justices, that the said lessor or lessors had been quietly and peaceably possessed of the lands, tenements, or messuages, so demanded to be delivered up as aforesaid, that he, she or they, being so possessed as aforesaid, let or leased as aforesaid, the said lands, tenements, or messuages, for a term which is now passed and expired and that they have given notice in the manner aforesaid, to the tenant or tenants in possession, to quit the same,

and that the said tenant or tenants have refused or neglected so to do, etc. * * *

* * * * * * *

(*a*) Thus if the term expires on the 4th day of July the notice to quit must be given on or before the 4th day of June; or where the tenancy is monthly, commencing on the first of a month, it can only be terminated at the end of a month after one month's notice. However, express the stipulation as to termination of the tenancy, one month's notice must be given under this act. This act has reference to those where the term of the tenancy is specially agreed upon; or where, by giving the notice required to determine a tenancy from year to year, the landlord acquires the right to obtain possession of the demised premises. The act prescribes no notice for the purpose of determining a tenancy from year to year and we are left in this respect to the English rule of law. Where the parties are silent as to the length of notice required, the law demands, that in the case of tenancy from year to year, it should be at least half a year (not merely six lunar months); so that it may be laid down as a general rule that, in order to put an end to a tenancy from year to year, there must be half a year's notice to quit, a rule that extends equally to houses, lands, etc. Bl. Rep., 596; 1 T. R., 159; 7 Bro. P. C., 64. When one year of the tenancy is run out and a new year is entered upon the parties have a right to hold each other to the tenancy for the whole of that year. The time, therefore, required for quitting must expire exactly with the current year. For as, on the one hand, neither party has a right to put an end to the tenancy before the expiration of the year, so, on the other

hand, if the notice overstep its expiration, a new year is entered upon and a new right to enjoy that year arises. 3 Taunt., 410. Thus, if the tenancy commenced on the first day of January, it can only be terminated at the end of that, or some succeeding year, and then only by notice to that effect, given on or before the first day of July. 2 Salk., 413; 1 T. R., 38*c*; 4 East., 32. The half year's notice required to be given, is one hundred and eighty-two days and a quarter. Dyer 548 *a*. A reservation of rent quarterly is dispensation of the half year's notice. 1 Esp. N. P. C., 266. It is now clearly settled that, where the relation of landlord and tenant is created without any limitation as to time, such tenancy shall be from year to year, not determinable at the will of either party; nor even at the end of the current year, unless by a notice to quit, regularly served by the party intending to dissolve the tenancy; so that, unless such notice be given, the tenancy may run on from year to year, until some extraordinary event spring up to destroy it. See 2 Sal., 414; Burr. 1609; Bl. Rep., 1172, and numerous cases throughout the Term Reports. See *ante*, 7. In all cases where the time of expiration of the tenancy is doubtful, it seems the most eligible form to give notice to quit at expiration of the current year or quarter or month (as the case may be) of the tenancy, which shall expire one-half year or quarter or month (as the case may be) from the service of the notice; it not being necessary to specify the particular day on which the tenancy is supposed to end. 2 Esp. N. P. C., 589. If the letting is for a quarter, a month, a week, the notice to quit must be quarter, a month, or a week, corresponding with the letting. 1 Esp. N. P. C. 94; but we have seen, at least one month's is necessary in all cases to enable the landlord to oust the tenant under this act.

APPENDIX B.

For an excellent summary of regulatory and other methods adopted to deal with the situation created by the world-wide shortage of housing facilities, including

Government construction.
State and local advancing of funds.
Tax exemptions and similar measures.
Legislative regulation of housing and rentals.
Readjustment of other landlord and tenant laws.
Investigation of cost of building.
Use of public funds in aid of housing.

see the article entitled "Rent Regulation and Housing Problems" by Walter F. Dodd and Carl H. Zeiss, of the Chicago Bar, appearing on page 5 of the Journal issued by the American Bar Association of January, 1921, Vol. VII, No. 1.

For a review of housing conditions in the District of Columbia see Report of the District Council of Defense, June 9, 1917, to June 30, 1919, printed by the Government Printing Office in 1919, page 19 *et seq.*

"How Housing Affects Health," see Vol. 1 of Report of U. S. Housing Corporation, printed by Government Printing Office, 1920, pages 2 and 3.

"Rent Profiteering," U. S. Housing Corporation Report, *supra*, pages 29 and 100.

Utilizing and Commandeering Houses in Washington, see Housing Corporation Report, *supra*, pages 30 and 31.

Report of Washington Homes Registration Service, Housing Corporation Report, *supra*, page 326 *et seq.*

Calder Report.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 640.

JULIUS BLOCK, PLAINTIFF IN ERROR,

vs.

LOUIS HIRSH, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

MYER COHEN,
RICHARD D. DANIELS,
WM. G. JOHNSON,
Counsel for Louis Hirsh.

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Authorities Cited.

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Statement.

This case is brought here by Writ of Error to review a judgment of the Court of Appeals of the District of Columbia (Rec., p. 24), which judgment affirmed a judgment of the Supreme Court of the District of Columbia (Rec., pp. 19-20) by which it was adjudged that the defendant in error recover from the plaintiff in error certain real estate in the City of Washington, District of Columbia.

The original proceeding was begun by Hirsh by Complaint and Summons in the Municipal Court of the District of Columbia (Rec., pp. 2-6), instituted January 6, 1920 (Rec., p. 7), under the Landlord and Tenant laws of the District, for the possession of the property against Block, the tenant in possession, under a lease, the term having expired on December 31, 1919 (Exh. A, Rec., pp. 4-6).

The Municipal Court rendered judgment for the defendant, Block (Rec., p. 7), from which the plaintiff,

Hirsh, appealed to the Supreme Court of the District (Rec., p. 8), which court, also, gave judgment for the defendant from which Hirsh appealed to the Court of Appeals (Rec., p. 15). The Court of Appeals reversed the judgment of the Supreme Court and remanded the cause for further proceedings (Rec., p. 16). Upon such remand the Supreme Court rendered judgment for the plaintiff, Hirsh, for possession of the property (Rec., pp. 19-20). From this judgment the defendant Block appealed to the Court of Appeals (Rec., pp. 20-21). On this second appeal the Court of Appeals affirmed the judgment of the Supreme Court of the District of Columbia (Rec., p. 24), and the defendant Block brought the case to this court by Writ of Error, as before stated.

The Facts.

This case, which, as above shown, was an action at law for possession of real estate grows out of the following facts. Mary A. Cushing and Isabella Varney were, on and prior to December 1, 1916, the owners, in fee simple, of the land and improvements in controversy and they authorized one John T. Knott, who was their agent in charge of said real estate to lease the same (Rec., p. 2). Knott leased the premises to Block, the plaintiff in error, by a certain agreement, signed by both lessor and lessee which agreement is set out in full in the record (Rec., pp. 4-6). Block entered into possession under said lease and paid the rent thereunder, according to the provision of the lease, to the end of the term demised, which term extended from the first day of January, 1917, to and including the thirty-first day of December, 1919, (Rec., p. 3).

On November twelfth, 1919, Cushing and Varney sold and conveyed the said real estate in fee to one

Luchs, who, on the same day, conveyed the same in fee simple to the defendant in error, Louis Hirsh, who had paid the consideration for the property and both deeds were duly recorded on the following day. On November 13, 1919, Knott, the lessor of Block, duly assigned the lease to Shannon & Luchs, who, on the same day, duly assigned it to Hirsh, who appointed Shannon & Luchs his agents to collect the rent for the residue of the term, and, on December third, 1919, Block, the plaintiff in error, paid to said Shannon & Luchs, the rent for the month ending December 31, 1919 (Rec., p. 3).

By this lease the plaintiff in error covenanted among other things that—

> "he will *not assign this lease or any portion of the term, or sublet the premises or any part thereof*, without the written consent of the lessor (Rec., p. 5),

that he would not suffer the premises to be used

> "for any other purpose than store for ladies' wear (Rec., p. 5);
> "that he will *at the end of his tenancy surrender* the said leased premises" (Rec., p. 5).

He also covenanted and agreed to—

> "keep and perform each and every of the covenants, conditions, and agreements herein contained" (6).

And that—

> "this lease shall bind the executors, administrators, heirs and *assigns* of the respective parties hereto" (Rec., p. 6).

During the continuance of the term demised by this lease certain legislation was enacted by Congress on May 31, 1918, and July 11, 1919, colloquially known as

the "Saulsbury Resolution" and its amendment, and on October 22, 1919, colloquially known as the "Ball Act," which are printed in full in the appendix to this brief.

The general result of this legislation is that, notwithstanding the expiration of the term demised in a lease, the lessee may, at *his* option, retain possession of the premises, against the will of the lessor. The lessee, Block, in the courts below, set up this legislation of Congress as his authority for violating his covenant in the lease and as a justification for continuing in possession, in defiance of his express agreement to surrender possession at the end of the term (Rec., pp. 13-14). The Court of Appeals held, on the first appeal, (the Chief Justice dissenting) that the legislation was unconstitutional and void and that Block's defense was, therefore, unavailable. The opinion of the court and the dissenting opinion on that appeal are set out in the record (Rec., pp. 25-40). On the second appeal, these opinions were adopted by the court and the Chief Justice as their reasons for the judgment and dissent, respectively, on that second appeal (Rec., p. 24).

ARGUMENT.

It is respectfully submitted that the legislation referred to is plainly unconstitutional and void, because its obvious and inevitable effect is to deprive the defendant in error of his property without due process of law, to take his private property for private use and bestow it upon another, without compensation, and, in an action at law, in which the value in controversy exceeds twenty dollars, to deny to him, and to deprive him of, the right of trial by jury.

In order to appreciate the necessary effect of the

legislation in question upon the rights of Hirsh, it is material to consider what was the situation in fact and law before its enactment.

On December first, 1916, when the lease here involved was executed, Hirsh's grantors had a vested estate in fee simple in the real estate in question and were in possession thereof.

By the common law, theretofore in force in this District, and continued in force, by express enactment in the Code (Code, Sec. 1), an essential element of an estate in fee was the owner's unqualified right of alienation, and this alienation might be of the whole, or of less than the whole, thus creating lesser estates than a fee. Upon the creation of a lesser estate, by the alienation of a part, there was still left in the fee simple owner a vested estate: a reversion in fee. At common law,

> "An estate in reversion is the residue of an estate left in the grantor to commence in possession after the determination of some particular estate granted out by him . . . and so also the *reversion*, after an estate for life, *years* or at will, *continues in the lessor*" (Bl. Com. Book II, p. 175).

And this estate is specifically recognized in the Code:

> "A reversion is the residue of an estate left in the grantor who has conveyed, or in the heirs of the devisor who has devised a particular estate less than his own, and *which returns to his or their possession on the expiration of the particular estate*" (Code, Sec. 1019).

A reversion is also classified, by the Code, as an estate "in expectancy."

> "An estate *in expectancy* is either a *reversion* or a future estate" (Code, sec. 1018).

The unqualified common law right of alienation of a vested reversion is expressly affirmed by the Code.

> "*Expectant* estates (i. e., reversions, sec. 1018) shall be descendible, devisible and *alienable* in the same manner as estates in possession" (Code, sec. 1034).

The Code also provided remedies for reducing this reversion to *actual possession* upon termination of the particular estate.

> "Whenever a lease for any definite term shall expire . . . and the tenant shall fail or refuse to surrender possession of the leased premises the landlord may bring an action of ejectment *to recover possession* in the Supreme Court of the District, or the landlord may bring an action *to recover possession* before a justice of the peace,* as provided in chapter one, subchapter one, aforesaid" (Code, sec. 1225).

The material provisions of subchapter one, above referred to are that—

> "Whenever any tenant shall unlawfully detain possession of the property leased to him, *after his tenancy therein has expired* . . . it shall be lawful for any justice of the peace,* on complaint under oath *by the person aggrieved by said unlawful detention*, to issue a summons to the party complained of to appear and show cause why judgment should not be given against him *for the restitution of the possession*" (Code, sec. 20).
>
> "If upon the trial it appears that the plaintiff is entitled to the possession of the premises, judgment and execution for the possession shall be awarded in his favor, with costs" (Code, Sec. 22).

Finally the Code provides that—

> "The *grantee or assignee of the reversion* of any leased premises *shall have the same right* of

*Changed to "Municipal Court" by Act of February 17, 1909.

> *action* against the lessee . . . for any . . . breach of any covenant or condition in the lease which the grantor or assignor might have had" (Code, sec. 1234).

From the foregoing it is indisputable that at the time of making the lease to Block and of his entry into possession thereunder, the owners had a *vested* estate, *a reversion in fee*, to come into possession, absolutely, on January 1, 1920; Block was a tenant in possession whose right of possession absolutely terminated on December 31, 1919, and by his covenant in the lease he had specifically agreed to surrender possession on that date. Also, that there existed legal remedies for enforcing this right of possession, should the tenant violate the agreement in his lease, and fail to surrender possession at the expiration of the term demised.

The owners also had an unrestricted right of alienation of the property, in the open market, to any purchaser whomsoever, and such alienation would confer upon their alienee all their rights of possession, subject to no lien, claim or charge of any kind, in behalf of the tenant, beyond the rights conferred by the lease itself.

They and their grantee would also have the right, either during or at the end of the term demised by the lease, to let the property anew, by successive lease, to begin at the expiration of the term demised, to another tenant, at the same or a higher or lower rent, or upon any other consideration, and the lessors and their grantee might, if they so preferred, occupy the property themselves or allow it to remain vacant; all without let or hindrance from the tenant.

The lease to Block, as appears on its face, preserved to the lessors and their grantee all of these rights to their utmost extent (Rec., pp. 4-6).

Block nowhere denies that such were the rights of

the lessors; on the contrary, in his affidavit of defense he admits (Rec., p. 13):

> "That on the first day of December, 1916, he leased *for a period of three years* beginning the first day of January, 1917, and *ending the thirty-first day of December, 1919*, the ground floor and storeroom of premises," etc.

But he now claims that these rights of the lessors, and of their grantee, under the lease by which he obtained that possession, *have all been swept away;* not by any contract or agreement of the parties, but by *subsequent legislation of Congress.* And further, that by that legislation there has been conferred upon him the right and power, *at his option*, to retain possession of said property, in violation of his covenant in the lease, and after the expiration of the term demised. He states that claim in the language following (Rec., p. 14):

> "For that *by virtue of the Ball Bill*, hereinbefore quoted, the affiant, as lessee, under the said lease, is *protected by continuance of the said lease and is entitled to remain in possession of the said premises, notwithstanding the expiration of the term fixed by the said lease.*"

The broad claim, thus unequivocally made, that by the legislation of Congress, the private rights of Hirsh in this real estate have been transferred to Block, to hold at Block's option, necessarily leads to two basic enquiries, viz.: (1) Does the legislation by Congress attempt to transfer Hirsh's rights to Block and (2) if so, is the legislation constitutional.

The Legislation Analyzed.

The legislation specifically mentioned and relied upon in Block's defense is the "Ball Act," being sections 191 to 122 of the act approved October 22, 1919 (41

Stat., 298, Appendix, pp. iii). This act can not, however, be properly considered alone, but must be read in connection with the prior legislation on the same subject, that is, the "Saulsbury Resolution" and its amendment (40 Stat., 593, 41 Stat., 104, Appendix, pp. i, ii) with which the "Ball Act" is, to a certain extent, interwoven, and also in order to determine the state of the law *at the time this cause of action arose*, that is, whether the "Saulsbury Resolution" controlled, or had been superseded by the "Ball Act," or whether the two operated concurrently. For convenience of comparison the parts of the "Saulsbury Resolution" and of the "Ball Act" relating to the right of possession are here reproduced in parallel.

The "Saulsbury Resolution."	Sec. 109 of the "Ball Act."
No judicial order, decree, or judgment for the recovery of possession of any real estate in the District of Columbia, *now or hereafter held* or acquired by oral or written agreement of lease for one month or any longer period, *or for the ejectment or dispossession of a tenant therefrom, shall be made, and all leases thereof shall continue so long as the tenant continues to pay rent at the agreed rate and performs the other conditions of the tenancy which are not inconsistent herewith,* unless . . . the premises are *necessarily* required by a *landlord or bona fide purchaser for occupation either by himself or his wife, children, or depend-*	"*The right of a tenant to the use or occupancy of any rental property,* hotel or apartment, *existing at the time this Act takes effect, or thereafter acquired, under any lease or other contract for such use or occupancy* or under any extension thereof by operation of law, *shall, notwithstanding the expiration of the term fixed by such lease or contract, continue at the option of the tenant* subject, however, to any determination of regulation of the commission relevant thereto; *and such tenant shall not be evicted or dispossessed so long as he pays the rent* and performs the other terms and conditions of the

tenancy as fixed by such lease or contract. . . . Every purchaser shall take conveyance of any rental property, hotel, or apartment subject to the rights of tenants as provided in this title. The rights of the tenant under this title shall be subject to the limitation that the bona fide owner of any rental property, apartment or hotel shall have the right to possession thereof for actual and bona fide occupancy by himself, or his wife, children, or dependents, or for the purpose of tearing down or razing the same in order immediately to construct new rental property, hotel, or apartment if approved by the commission, upon giving thirty days' notice in writing, which notice shall contain a full and correct statement of the facts and circumstances upon which the same is based.

A comparison of this legislation discloses that there are two purposes declared in both which are that, in general, a tenant *may*, at his option, continue in possession *after* the expiration of the term created by his contract and against the opposition of the landlord, and that a purchaser of the property shall take the same subject to and burdened with this new statutory grant of right to the tenant.

Exceptions to this right given the tenant are contained

in both the "Saulsbury Resolution" and the "Ball Act," but these exceptions differ. By the "Saulsbury Resolution" this right of continued possession is not given against a landlord, or a bona fide purchaser, who is "in the employ of or officially connected with any branch of the Government" if the "premises are *necessarily required*" for occupation by himself, family or dependents; also it may not be asserted against a bona fide purchaser to whom the property has been *sold* "for his own occupancy," regardless of whether such purchaser is in the employ of or officially connected with the Government, or whether the premises are "necessarily required" by him. Three exceptions to this privilege conferred on the tenant are thus created by the "Saulsbury Resolution," namely:

1. In favor of the *landlord* who *is* officially connected with the Government and *necessarily requires possession* for himself, family, or dependents.

2. In favor of a *purchaser* who *is* officially connected with the Government and *necessarily requires possession* for himself, family or dependents.

3. In favor of a purchaser who is *not* officially connected with the Government and who does *not* necessarily require possession, but to whom the property was *sold for that purpose*—that is for his own occupancy.

The "Ball Act" contains but two exceptions, both in favor of the "bona fide *owner*." By the definitions in the act (sec. 101) the term "*owner*" is declared to include "a lessor or sublessor, or other person entitled to receive rent or charges for the use or occupancy of any rental property . . . or his agent."

Whether this definition is intended to include a "purchaser" from the landlord, or only the landlord, is not clear, but whether or not so intended, two of the conditions contained in the "Saulsbury Resolution" are dropped out in the "Ball Act." By the "Ball Act" it is

not required that the "owner," shall be "in the employ of or officially connected with any branch of the Government" or that "the premises are necessarily required" by the "owner." In lieu thereof it is provided (*a*) that the "owner" shall "have the right to possession thereof *for* actual and bona fide occupancy by himself" or (*b*) "for the purpose of tearing down or razing the same in order immediately to construct new rental property, hotel or apartment if approved by the commission, upon giving thirty days' notice in writing . . . which notice shall contain a full and correct statement of the facts and circumstances upon which the same is based."

From this brief analysis of the legislation it is apparent that the differences between the provisions of the "Saulsbury Resolution" and the "Ball Act" are such that they inevitably come into conflict and in addition there is the provision in the "Ball Act" *for giving notice* to the tenant, a feature not contained in the "Saulsbury Resolution."

No notice was given by Hirsh, in this case, conforming, or attempting to conform, with this requirement of the "Ball Act," and the fact that he had given no such notice was also set up by Block as a defense (Rec., p. 14).

The Chief Justice in the court below, in his dissenting opinion treats this requirement to give notice as a valid and applicable provision of the "Ball Act" and holds that Hirsh's failure to give the notice prescribed by the "Ball Act" should be decisive against Hirsh's right to possession (Rec., pp. 32-35).

The Requirement For Notice to the Tenant Embodied in the "Ball Act" Neither an Applicable Nor Valid Provision of Law.

When the lease in this case was executed and Black went into possession under it no notice was required to entitle the lessors and their grantee to possession at the expiration of the term. The law then in force (Code sec. 1218) provided that:

> "When real estate is leased for a *certain term* no notice to quit shall be necessary, but the landlord shall be entitled to the possession, without such notice, immediately upon the expiration of the term."

It may be conceded, for the purposes of this discussion, that a change in the law merely requiring a notice to be given where none had been required before might be valid, if the law could be complied with and the notice given without extending the tenant's right of possession beyond the term of the lease, or interfering with any other vested right of the lessors. Mere changes in *remedies or procedure*, which do not affect the *property right*, or take away all effective remedy, as, for instance, changes in the Statute of Limitations, may be validly made. But, as was said by Mr. Justice Pitney, speaking for this court in Ochoa *vs.* Hernandez, 230 U. S., 139, 161-2:

> "They may be modified by shortening the time prescribed, but *only* if this be done while the time is still running, so that *a reasonable time still remains for the commencement of an action before the bar takes effect.*"

It is respectfully submitted that the notice provided in section 109 of the "Ball Act" is not applicable to the case at bar, but if applicable, that it is invalid because (1) the "Ball Act" was not operative when Hirsh's right of possession accrued; (2) any notice given under it

would have extended Block's right of possession beyond the term of the lease; (3) the notice would have operated as a direct limitation upon Hirsh's right of possession under the lease; (4) it would have required Hirsh to surrender, in advance, his constitutional right to a trial by jury; and (5) it would have precluded Hirsh from questioning the constitutionality of the statute.

1. The "Ball Act" Was Not Operative When Hirsh's Right of Possession and Right of Action Accrued.

The term created by the lease to Block expired on December 31, 1919. A notice of thirty days, to be effective by the end of the term must have been given and served, as required by the law, not later than December 1, 1919. But at that date, the notice could not be given because the "Ball Act" had not then become operative, the "Saulsbury Resolution" both by its own provisions and by those of the "Ball Act," was still in force and controlled procedure.

The "Saulsbury Resolution" as originally adopted declared that its provisions should be in force,

> "*until a treaty of peace shall have been definitely concluded* between the United States and the Imperial German Government."

By the amendment to that resolution, approved July 11, 1919, its provisions—

> "are extended and continued in full force and effect *for a period of ninety days following the definite conclusion of a treaty of peace* between the United States and the Imperial German Government."

Section 119 of the "Ball Act" provides that:

> "The public resolution entitled 'Joint resolution to prevent profiteering in the District of Columbia,' approved May 31, 1918, as amended, *is*

> *hereby repealed, to take effect sixty days after the date of the confirmation by the Senate of the commissioners first nominated by the President under the provisions of this title*; but a determination by the commission made within such period of sixty days shall be enforced in accordance with the provisions of this title, notwithstanding the provisions of such public resolution. All laws or parts of laws in conflict with any provision of this title are hereby suspended so long as this title is in force to the extent that they are in such conflict."

While section 119 of the "Ball Act" expressly repeals the "Saulsbury Resolution" by the words "is hereby repealed," yet that repeal is *not immediate* on the approval of the act, but is deferred by the qualifying words immediately following the repeal. By these words it is declared that the repeal is—

> "*to take effect* sixty days *after* the date of the *confirmation by the Senate of the Commissioners* first nominated by the President under the provisions of this title."

This court will take judicial notice of the fact (Keyser *vs.* Hitz, 133 U. S., 138, 146) that the Senate did not confirm the Commissioners first appointed by the President until January 14, 1920, and as the repeal of the "Saulsbury Resolution" was not to "take effect" until "sixty days after" that event, the actual repeal did not take effect until March 14, 1920, and until that date the "Saulsbury Resolution" continued in full force and effect.

Careful examination of the "Ball Act" will disclose the reason and, in fact, necessity for postponing the repeal of the "Saulsbury Resolution" until after the confirmation of the Commissioners to be appointed under the "Ball Act." By the "Ball Act" practically the entire subject of the relations between landlord and tenant was turned over to this commission, including the power to pass upon the sufficiency in fact and law of the notice. It was

obvious that it would take time for the President to select the Commissioners and that their confirmation by the Senate might not be instantaneous, and that even after their confirmation by the Senate an appreciable time would be required for the Commissioners to organize, adopt rules and regulations for proceedings, and the like, and it was the manifest purpose of Congress that during that necessary interim there should be no hiatus in the legislative control and that the "Saulsbury Resolution" should control the situation until sixty days after the Commissioners were confirmed.

As the provision of the "Ball Act" requiring the notice did not go into effect until after January 1, 1920, when Hirsh's right of possession was absolute, and, as neither the "Saulsbury Resolution" nor the law in force prior to that resolution, required or sanctioned any notice, Hirsh was not required to give any.

2. Any Notice Under the "Ball Act" Would Have Extended Block's Right of Possession Beyond the Term of the Lease.

By the limitation of the lease the term demised expired on December 31, 1919 (Rec., p. 5), and Block expressly admitted, in his defense, that the term expired on that date (Rec., p. 137) but claimed the right to remain in possession "notwithstanding the term fixed by the said lease" (Rec., p. 14). As the "Ball Act" was approved October 22, 1919, and Hirsh acquired his title to the property on November 12 (Rec. ,p. 12), 1919, it is freely admitted that he, or his grantors, could have given a "thirty days' notice in writing," and served the same in the manner provided by section 1223 of the Code, more than thirty days before December 31, 1919, the date of expiration of the term of the lease. If the *mere fact of giving this notice* would have satisfied the statute, would not have tended to impai Hirsh's rights under the lease, and

would have left him still entitled to possession on December 31, 1919, in accordance with the terms of his contract, the burden of giving the notice might have been assumed without objection. But such is not the case. The "Ball Act" requires (sec. 109), that the—

> "notice shall contain *a full and correct statement of the facts and circumstances upon which the same is based.*" . . . If there is a *dispute* between the owner and the tenant as to the *accuracy or sufficiency* of the statement set forth in such notice as to the *good faith* of such demand, or as to the *service of notice*, the matters in dispute shall be *determined by the commission* upon complaint as provided in section 106 of this title."

This is not merely a requirement to give a *notice*, but it creates a *new right to litigate*. Inseparably associated with the notice, and forming an essential part of it, is the right of the tenant *to dispute* it, as to its "accuracy," "sufficiency," "good faith," or "service," and in any such event, "the matters in dispute shall be determined by the commission." Hirsh could not avail himself of the statute and give the notice, and then object to the further proceedings thereunder, provided by the statute. If he entered upon this proceeding, at all, he was obliged to follow through with it wheresoever it led. The statute does not require that the tenant should make any showing against the notice, no pleading, no answer under oath or other requirement—the statute is satisfied "if there is a dispute"—the controversy then goes to *the commission, not to a court.*

On December 1, 1919, the *last day* on which the notice could have been given, so as to expire with the end of the term demised by the lease, *there was no commission* to hear the "dispute." The commission was not confirmed by the Senate until January 14, 1920. There was, therefore, no instrumentality in existence by which Hirsh, had he given the notice, could have made it effective

without extending Block's right of possession, *at the very least*, to the 14th of January, or fourteen days beyond the term fixed by the lease.

It is no answer to say that Block might not have raised "a dispute." The statute was before Hirsh, it advised him that if he gave such a notice, it was Block's statutory right to dispute its "accuracy," "sufficiency," "good faith," and "service," and to have that dispute determined by the commission, before Hirsh could take any proceedings for possession. Hirsh knew that Block would have every temptation to do so and that there was nothing in the statute to restrain him. This record shows that Block would have disputed it as Block sought to file a supplemental affidavit in the case asserting that "the present demand for possession of the said premises *is not made in good faith within the meaning of the Ball Bill*," etc. (Rec., p. 19). If Hirsh entered upon that plan of the statute he did so at his peril; and moreover the notice was not *in aid* of the lessor's rights under his lease, but in direct derogation of them. The necessary and inevitable consequence of giving the notice was to *extend Block's right of possession beyond the time limited by the lease*.

3. The Notice Required by the "Ball Act" Was a Direct Limitation Upon Hirsh's Right of Possession Under the Lease.

By the terms of the lease Hirsh had an absolute and unqualified right of possession of his property on December 31, 1919. The notice was not to be given in *furtherance* of this right but *in its limitation*. Instead of the unqualified and absolute right of possession under the lease the notice, by the express terms of the act (section 109) could only be availed of if the possession was sought for one of two purposes:

"(*a*) For actual and bona fide occupation by himself, or his wife, children, or dependents," or

"(*b*) for the purpose of tearing down or razing the same in order immediately to construct new rental property, hotel, or apartment, *if approved by the commission*."

In order to avail himself of any rights by this notice, he was compelled to abandon his absolute and unqualified contract right of possession, and to seek possession, not on his contract right, but on one of those grounds vouchsafed by the statute, and to establish his right *thereunder*, over the "dispute" of the tenant and to the satisfaction of the commission.

4. This Provision For Notice Required Hirsh to Surrender, in Advance, His Constitutional Right to a Trial by Jury.

By the express terms of section 109, if there was any dispute about the notice,—

"the matters in dispute *shall be determined by the commission* upon complaint as provided in section 106 of this title."

By section 106, it is provided that:

"The commission shall promptly *hear and determine all complaints* submitted to it."

And by the same section it is further provided that:

"In *any* suit in *any* court of the United States or the District of Columbia involving *any* question arising out of the *relation of landlord and tenant* with respect to *any* rental property, apartment or hotel, *except on appeal* from the commission's determination, *as provided in this title*, such court shall determine the *rights* and duties of the parties *in accordance with the determination* and regulations of *the commission* relevant thereto."

The commission is not only empowered to *determine* all "matters in dispute" under the notice, but this "determination" by the commission shall bind all courts of the United States or the District of Columbia, "except *on appeal* from the commission's determination, *as provided in this title.*"

The only right of appeal "provided in this title" is that given by section 108 to the Court of Appeals of the District of Columbia. But that appeal does not provide for a jury trial nor authorize a review of or change in the commission's determination on *matters of fact.* By the specific terms of that section—

> "the commission's determination shall *not be modified* or set aside by the court, *except for error of law.*"

Indeed the appeal allowed is a practical nullity. It is limited to "*errors of law,*" but by section 115, the commission and the parties are *not bound by the rules of pleading or evidence.* Practically, therefore, the only "errors of law" imputable to such a tribunal would be proceeding without notice.

From these excerpts from the statute it is seen that the sole power of determination of issues of fact under this notice is the commission, and that its decision thereon is final and conclusive, binding upon all courts of the United States, preserving no right, at any stage of the proceedings, for a trial by jury.

The chief justice, in his dissenting opinion in the court below, with reference to the objection that resorting to the "notice" provided for in the "Ball Act" would deprive Hirsh of a jury trial says (Rec., p. 35):

> "My associates say that the act deprives Hirsh of his right to a trial by jury, in disregard of the Seventh Amendment to the Constitution. But he did not ask for a jury trial. On the contrary,

> he moved the court under rule 19, as I have shown, for a judgment without the intervention of a jury."

It is respectfully submitted that in this the learned Chief Justice passes around the point under consideration instead of meeting it.

As the record clearly shows, Hirsh was not complaining that he *had* asked and been *denied* a jury trial of issues raised on the notice. *He had not given the notice*, and there was, therefore no issue upon it to be tried by jury or otherwise. He was *excusing* himself for not giving the notice on the ground that *if* he *had* given it, he *would* have been deprived of a jury trial, because the statute, *which alone authorized the notice, also denied a jury trial* of issues arising upon it. By the express terms of the statute the right to give the notice and to claim anything under it, was upon the condition that he surrender his constitutional right to a trial by jury if his notice was disputed.

5. Giving the Notice Would Have Precluded Hirsh From Questioning the Constitutionality of the Statute.

The statute in this case undertook to take from Hirsh his right of possession of his property and transfer it to Block to hold at Block's option. The same statute gave Hirsh a means of escape from this spoliation for Block's benefit in two cases; if he wished the property for his own occupancy, or wished to tear down the building and immediately rebuild for rental purposes. But the escape from this spoliation was *conditioned, in the same section of the same act.* The conditions were, first, that he give Block a thirty days' notice, containing a full and correct statement of the facts and circumstances upon which it was based; second, that Block might dispute that notice as to its accuracy, sufficiency, good faith and service; and, third, that the commission should finally

determine that dispute, without a jury trial and its decision on the facts should be final, and binding upon every court of the United States and of the District of Columbia.

Hirsh had another mode of escaping this spoliation, in Block's behalf, and that was by appealing to the courts for protection from the spoliation under the constitutional guaranties of property right.

He had perfect freedom to pursue *either* course but could not pursue *both*. If he elected to avail himself of the mode of escape given by the statute and gave the notice he was then bound by his choice and could not question the constitutionality of the statute. Such is the settled law of this court.

Daniels *vs.* Tearney, 102 U. S., 415, 421.
Electric Co. *vs.* Dow, 166 U. S., 489, 490.
Wight *vs.* Davidson, 181 U. S., 371, 377.
Grand Rapids Ry. *vs.* Osborn, 193 U. S., 17, 29.
Shepard *vs.* Barron, 194 U. S., 553, 567.

For this reason, also, Hirsh elected not to avail himself of any provision of the "Ball Act" but to appeal to the courts and insist upon his rights under his contract and the Constitution of the United States.

The Legislation of Congress Relied Upon by Defendant in Error Is Unconstitutional and Void.

In order to determine whether an act of legislation is constitutional it seems proper that attention should first be directed to the necessary operation and effect of the legislation upon the rights of the party complaining of its invalidity. This involves, at the outset, the very definite ascertainment of those rights. Happily, in the case at bar, the rights of Hirsh are not disputed. They are set out in detail in the record (Rec., pp. 2-6,

11-13), and are admitted by Block in his defense (Rec., pp. 13-14). They may be briefly summarized thus: Hirsh is the *owner in fee* of the real estate in controversy and Block *is his tenant* under a lease by which Block's right of possession terminated, absolutely, on December 31, 1919, on which day, by the terms of said lease, Hirsh was unconditionally entitled to the possession and had an immediate and *unconditional* right of re-entry. Block refused to surrender possession and Hirsh brought this action at law to recover the possession. Block's sole defense is that, notwithstanding the expiration of his term, under the lease, the "Ball Act" entitles him to retain possession, at his option, and against the demand of his landlord, for a period of two years.

Does the legislation under consideration produce that result?

That it does is not open to question and for this purpose it is immaterial whether the "Ball Act," alone, be in force, or the "Saulsbury Resolution" was continued in force by the provisions of Section 119 of the "Ball Act" and controls or to some extent operates concurrently with the "Ball Act," because both deal with the right of possession and both take that right of possession from the landlord and bestow it upon the tenant.

The operative words of the "Saulsbury Resolution" to accomplish this are that—

> *"No judicial order, decree, or judgment for the recovery of possession of any real estate in the District of Columbia, now or hereafter held or acquired by oral or written agreement of lease for one month or any longer period, or for the ejectment or dispossession of a tenant therefrom, shall be made, and all leases thereof shall continue so long as the tenant continues to pay rent at the agreed rate."*

The applicable provisions of the "Ball Act" are that—

> "The *right* of a *tenant* to the *use or occupancy* of any rental property . . . *existing at the time this act takes effect*, or thereafter acquired, *under any lease or other contract for such use and occupancy* . . . *shall, notwithstanding the term fixed by such lease or contract, continue at the option of the tenant* . . . and such tenant *shall not be evicted or dispossessed* so long as he pays the rent and performs the other terms and conditions of the tenancy as fixed by such lease or contract." . . .

There can be no possible disguise by which the effect of this legislation can be concealed.

Language and purpose are alike plain. It enacts that notwithstanding the fact that Julius Block's lease of 919 F Street expires, absolutely, on the 31st of December, 1919, and that the unconditional right to immediate possession, on that day, accrued to the lessors and to their assignee, nevertheless, the said Julius Block, *if he so please*, may retain possession *for two years longer* and that the rightful owner shall not maintain any proceeding to recover possession.

Another provision, common to both laws, is one restraining the owner's power of alienation. In the "Saulsbury Resolution" it is said:

> "Every purchaser shall take the conveyance of any premises *subject to the rights of all tenants* in possession thereof *under the provisions of this resolution.*"

And, in the "Ball Act" it is provided that—

> "Every purchaser shall take conveyance of any rental property, hotel, or apartment, *subject to the rights of tenants as provided in this title.*"

By these provisions the fee simple owner's title is subjected to a lien in favor of the tenant and the owner's

power of alienation is cut down and restrained by requiring that all purchasers shall take subject to that lien in favor of the tenant. This restraint upon the power of alienation is heightened by the fact that the lien is for no definite time, but at the caprice of the tenant.

There is here presented the following state of facts. Prior to the legislation complained of, Hirsh's grantors were the owners in fee of the real estate, with no lien or incumbrance save the unexpired term of a lease to Block, expiring on December 31, 1919, with an absolute and unconditional right of possession in Hirsh at that date and with a power of sale subject only to the unexpired term of *that lease*.

Without any new contract between the parties, without the owners' consent, without any act done by either, without any consideration or compensation to the fee simple owner, and without a hearing or notice of any kind, but solely by legislative declaration, this reversion of the owner is taken from him and given to the tenant and the owner's power of sale is made subject to this lien for an extension of lease at the will of the tenant.

By section 118 of the "Ball Act" the *tenant* may, however, with the consent of the commission, *assign or sublet* this reversion of the owner, *at a profit to the tenant*.

Nor is this all. By the terms of the "Saulsbury Resolution" the rent to be paid for this statutory appropriation of the owner's reversion to the use of the tenant is *fixed by the legislature* at the rate of rent *fixed by the lease*, no matter how much the rental value may have increased.

A yet further invasion of the owner's rights is provided by section 106 of the "Ball Act." Under that provision, a tenant may not only avail himself of the privilege to appropriate the owner's reversion to his own use, but

may call upon the commission to *reduce* the rent and, the commission may make that reduction and under section 107 require the owner *to refund rent paid under the lease.*

It is earnestly insisted that these invasions of private property rights are all unconstitutional and void, because they take private property for private use, they take private property without compensation and they deprive the owner of his property without due process of law.

In Missouri Pacific Ry. Co. *vs.* Nebraska, 164 U. S., 403, the State Board of Transportation, *after notice to the railway company and hearing evidence and arguments* found that two existing elevators were insufficient to handle the grain shipped at Elmwood Station, that it was necessary for the public that another elevator should be erected, that the act of the company in granting the right to the operators of the existing elevators and refusing a like privilege to the complainant was an unreasonable discrimination, etc. (p. 412), and the board passed an order requiring the company to allow the complainants to erect an elevator on the railway company's land adjacent to its track, etc. (p. 413). The railway company did not obey the order; mandamus proceedings were instituted in the Supreme Court of the State, to compel obedience *and, after a hearing,* the Supreme Court found the issues in favor of the board and ordered obedience to it by the railway company (p. 413). The company sued out a writ of error and Mr. Justice Gray, delivering the opinion of this court, said (Rec., p. 417):

> "This court, confining itself to what is necessary for the decision of the case before it, *is unanimously of opinion,* that the order in question, *so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect,*

> *a taking of private property of the railroad corporation, for the private use of the petitioners.* The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

If this action, in Nebraska, *after a hearing before the board and a hearing in court* constituted taking of private property for private use and without due process of law, how can an act of legislation, *without any hearing* be any less so?

At the August Term, 1798, of this court, slightly more than a decade after the adoption of the Constitution, Mr. Justice Chase, delivering the opinion of this court in Calder *vs.* Bull, 3 Dall., 386, and discussing the restraints upon legislation affecting vested rights in private property, says (pp. 388-9):

> "There are certain *vital principles* in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; *or to take away that security for personal liberty, or private property for the protection whereof the government was established.* An act of the legislature (for I can not call it a law) contrary to the great first principles of the social compact, can not be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a

man a judge in his own cause; or a *law that takes property from A and gives it to B. It is against all reason and justice for a people to intrust a legislature with such powers; and, therefore, it can not be presumed that they have done it.* The genius, the nature, and the spirit of our state governments, *amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.* The legislature may enjoin, permit, forbid and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong, but they can not change innocence into guilt; or punish innocence as a crime; *or violate the right of an antecedent lawful private contract, or the right of private property.* To maintain that our federal or state legislature possesses such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in our free republican governments."

In Wilkinson *vs.* Leland, 2 Pet., 627, Mr. Justice Story says (pp. 657, 658):

> "*That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principle of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people.* The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention."

> *"We know of no case in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced."*

In Monongahela Navigation Co. *vs.* U. S., 148, U. S., 312, Mr. Justice Brewer, delivering the unanimous opinion of the court, says (p. 324):

> "Obviously, this question, as all others which run along the line of the extent of the protection the individual has under the Constitution against the demands of the government, is of importance; for in any society *the fulness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.* The first ten amendments to the Constitution, adopted as they were soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of persons and property which by the Declaration of Independence were affirmed to be unalienable rights."

(p. 325).

> "But we need not have recourse to this natural equity, nor is it necessary to look through the Constitution to the affirmations lying behind it in the Declaration of Independence, for, in this Fifth Amendment, there is stated the exact limitation on the power of the government to take private property for public uses. And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking

for the court, in Boyd *vs.* The United States, 116 U. S., 616, 635 'Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that *constitutional provisions for the security of person and property should be liberally construed.* A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. *It is the duty of courts to be watchful for the constitutional rights of the citizen,* and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*' "

And in Ochoa *vs.* Hernandez, 230 U. S., 139, Mr. Justice Pitney says (p. 161):

> "*Without the guaranty of 'due process' the right of private property can not be said to exist,* in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (Coke, 2 Inst., 45, 50), and has been recognized since the revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' *all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.*"

In the Sinking Fund Cases, 99 U. S., 700, Mr. Chief Justice Waite says (pp. 718-19):

> "The United States *can not any more than a State interfere with private rights,* except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, *but equally*

> *with the States they are prohibited from depriving persons or corporations of property without due process of law.*"

But apart from these limitations, there is no power in the United States, through Congress or otherwise, to take private property for *private* use. The right to take it *at all*, is not expressly conferred by the Constitution, but, as held in Kohl *vs.* United States, 91 U. S., 367, the right of Eminent Domain, to which all lawful taking is referred, is a necessary attribute of sovereignty, but limited to it *for sovereign purposes.* As said, in that case, by Mr. Justice Strong (pp. 374-5):

> "The proper view of the right of Eminent Domain seems to be, that it is a right belonging to a sovereignty to *take private property for its own public uses, and not for those of another.*"

Not only does this legislation attempt to take from the landlord owner his reversion and bestow it upon the tenant, to hold at the tenant's will, but it also denies all right of *judicial* redress. It does not change or substitute remedies, but denies them *in toto.* By the express terms of the Act, the tenant's "*right*" to "use or occupancy" shall "continue" "and such tenant *shall not be evicted or dispossessed* so long as he pays the rent."

But the previously existing right of action in the landlord to recover his property against wrongful detention is also "*property*" of which he may not be deprived without due process of law. As said by Mr. Justice Matthews, delivering the opinion of the court in Pritchard *vs.* Norton, 106 U. S., 124, 132:

> "Hence, it is that a *vested right of action is property* in *the same sense in which tangible things are property, and is equally protected against arbitrary interference.* Whether it springs from contract or from the principles of the common law, *it is not competent for the legislature*

> *to take it away.* A vested right to an existing defence is equally protected, saving only those which are based on informalities not affecting substantial rights, which do not touch the substance of the contract and are not based on equity and justice. Cooley, Const. Lim., 362-369."

And in Munn *vs.* Illinois, 94 U. S., 113, it is said, by Chief Justice Waite (p. 134):

> "Rights of property which have been created by the common law can not be taken away without due process."

It is also the constitutional right of the citizen to decide for himself with whom he will contract and whom he will accept or continue as tenant, and he may not lawfully be compelled to accept one as tenant of whom he does not approve. As said by Mr. Justice Harlan, in Adair *vs.* U. S., 208 U. S., 161, 173:

> "It was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, *as he chose*, an employe of the railroad company upon the terms offered to him. Mr. Cooley, in his treatise on Torts, p. 278, well says: '*It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice.* With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress.'"

In Coppage *vs.* Kansas, 236 U. S., 1, the principles announced in the decision in Adair *vs.* U. S., 208 U. S.,

161, were repeated and that case approved (pp. 9-14) notwithstanding able opposition from the dissenting members of the court.

The Existence of a State of War Gives No Validity to the Statute.

The violation of appellant's constitutional rights is neither justified nor palliated by the declaration, in the "Saulsbury Resolution" that—

> "by reason of the existence of a state of war, it is essential to the national security and defense, and for the successful prosecution of the war, to establish governmental control and assure adequate regulation of real estate in the District of Columbia."

Nor by the declaration in the "Ball Act." (Sec. 122), that—

> "the provisions of this title are made necessary by emergencies growing out of a state of war with the Imperial German Government."

War carries many and grievous afflictions, but among them is not the abrogation, temporary or permanent, of the constitutional limitations upon the power of Congress. Not one of the powers conferred, or restrictions imposed, upon Congress, by the Constitution, is accompanied with or qualified by any exception in the case of the existence of a state of war, unless it be the Third Amendment, which provides that—

> "No *soldier* shall, *in time of peace* be quartered in any house, without the consent of the owner, nor *in time of war* but in a manner to be prescribed by law."

In this amendment there is a plainly implied power in Congress to legislate as to the manner of quartering soldiers in a private house *in time of war*, but with

The Legislative Declaration That This Property Is Affected With a Public Interest Is, Itself, Invalid.

By section 106 of the Act it is declared that—

> "For the purposes of this title, *it is declared* that *all* (a) rental property and (b) apartments and hotels are affected with a public interest."

And by section 101 "rental property"—

> "means *any building* or part thereof or land appurtenant thereto in the District of Columbia *rented or hired*."

The *facts*, as shown by this record, should again be brought to the attention of the court in connection with this legislative declaration. What are they?

The owner in fee of a single store leased that store to a single individual for a definitely limited time. In that lease the lessee, Block, covenanted, among other things, that—

> "he will not assign this lease or any portion of the term, or sublet the premises or any part thereof without the written consent of the lessor" (Rec., p. 5).

And no such consent was ever given and no assignment or subletting ever indulged in.

By this lease the owner was precluded from entering the premises himself or sending any other persons thereon without Block's consent, and if Block assigned or sublet or surrendered possession to anyone else he would have broken his covenant against assignment or subletting, and, by a further covenant in the lease, he would have subjected himself to a forfeiture of the lease by such breach (Rec., pp. 5-6).

Any other person, entering or disturbing Block's possession would have been a *trespasser* and been liable in damages to Block for such trespass.

These facts, undisputed on the record, show that neither Hirsh nor his grantors did *any act* admitting or inviting *the public* to the possession or use of this property—on the contrary they did all that it was legally possible for them to do to *exclude* the public. The record also shows that the *public has acquiesced in that exclusion*, for it left Block in undisturbed possession throughout the term demised.

It is on this state of facts that section 106 of the "Ball Act" assumes to declare that this property is "affected with a public interest" and, therefore, not only subject to *regulation* by Congress, but to be corporally taken from the *owner* and turned over to the exclusive possession of a *tenant* to hold at the *tenant's option*, and with the right, in the *tenant* (sec. 118 "Ball Act") to *assign or sublet* the property for the *tenant's profit*. The *real owner*, however, is only allowed to sell his property "*subject to the rights of all tenants in possession*" thereof; the "*rights* of tenants" here referred to being not the rights created by their *contracts of tenancy*, but those *created by this legislation*. (Saulsbury Resolution and "Ball Act," section 109.)

It was contended, in the court below, that the decision of this court in the case of Munn *vs.* Illinois, 94 U. S., 113, justified this legislation and supported the proposition that the legislative body had the power to declare the *fact* that private property had become affected by a public interest. The learned Chief Justice of the court below, in his dissenting opinion, gives his unqualified approval to this doctrine, saying (Rec., p. 36):

> "Congress may not exercise this power except with respect to business or property clothed with a public interest. But who is to decide when property is so clothed? Manifestly this must be done in the first instance by Congress."

this exception there is no restriction upon the power of Congress not equally applicable in both peace and war.

And it is not going too far to say that there is also a plain implication in this amendment that no *civilian* shall be quartered in any house in time of *either peace or war*, without the consent of the owner.

In Hamilton *vs.* Kentucky Distilleries Co., 251 U. S., 146, this court, through Mr. Justice Brandeis, said (p. 156):

> "The war power of the United States, like its other powers and like the police power of the States, *is subject to applicable constitutional limitations.*"

In Mitchell *vs.* Harmony, 13 How., 115, this court, through Mr. Chief Justice Taney, states the rule as to war "Emergencies" in the following terms (p. 134):

> "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. *Unquestionably, in such cases, the government is bound to make full compensation to the owner;* but the officer is not a trespasser.
>
> "But we are clearly of opinion, that in *all* of these cases the danger must *be immediate and impending*; or the *necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for.* It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

(p. 135).

> "But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the *nature and character of the emergency*, such as he had reasonable grounds to believe it to be, and it is then *for a jury to say*, whether it was *so pressing as not to admit of delay; and the occasion such*, according to the information upon which he acted, *that private rights must for the time give way to the common and public good.*"

There is nothing in the record to suggest that Block's retention of possession against the right of the owner could in any way aid or influence the prosecution of the war. By the covenant in his lease he agreed not to assign or sublet or use the premises for any other purpose than a store for ladies' wear and, it will probably not be contended that the successful prosecution of the war against the Imperial German Government required that Mr. Block should continue to sell "ladies' wear" at 919 F Street. Had such been the view of Congress the law would have made it *compulsory* on the tenant to remain in possession instead of leaving it optional with him, and certainly it would not have authorized the *tenant*, to whom the reversion did *not* belong, to transfer the reversion to others by assignment or subletting, *at a profit* to himself, as section 118 of the "Ball Act" does, instead of allowing the lawful *owner* to control the disposition of his own reversion.

But even if some remote connection between the conduct of the war and this legislative transfer of one man's property to another without consideration and without the owner's consent could be seen or imagined that could not, it is respectfully submitted, abrogate the plain provisions of the constitution, which, in both peace and war protect private rights.

And further (Rec., p. 37):

> "What then is the test by which the court is to ascertain whether this determination by Congress is sound? The Supreme Court furnishes it. In Munn *vs.* Illinois, 94 U. S., 113, 132, it is said: 'For our purposes we must assume that, if a state of fact *could* exist that would justify such legislation, it *actually did* exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. *But if it could, we must presume it did.*'"

With the greatest deference it is respectfully submitted that the language quoted by the Chief Justice from the opinion of this court, in Munn *vs.* Illinois, was used with reference to a different subject than the *fact*, whether or not property was affected by a public interest. In Munn *vs.* Illinois, this court *did not base its decision that the grain elevators were clothed with a public interest on any statutory declaration* to that effect, but upon the *facts admitted by the plaintiff in error*. This is quite clearly and distinctly shown in the opinion. The first part of the opinion is devoted to showing that private property may be, by its owner, so devoted to public use as to cease to be *juris privati*, only, in which case it becomes subject to regulation while so affected. After devoting six pages to this subject, Mr. Chief Justice Waite then says (p. 130):

> "But we need go no further. Enough has already been said to show that, *when private property is devoted to a public use*, it is subject to public regulation. It remains *only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.*

> "For *this purpose* we accept as true *the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error.*"

He then quotes at great length *from the brief* a mass *of facts* bearing on the use of the elevators and concludes with this statement (p. 132):

> "Certainly, if any business can be clothed 'with a public interest and cease to be *juris privati* only,' this has been. *It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts.*"

It is thus a demonstration from the opinion that this court did *not* accept any declaration in the State Constitution or statute to the effect that this property was clothed with a public interest as conclusive or as any evidence of the fact, but, itself, ascertained and found the facts from the admissions of the plaintiffs in error.

Once the *fact* of a "public interest" was established, *by proper evidence*, it then became necessary to determine whether, in the exercise of the police power to regulate the use of such property, the legislature had exceeded its powers. It was with reference to the facts calling for the exercise of the *particular kind of regulation* which the statute provided, that the court uses the language quoted in the dissenting opinion of the court below, and not upon the question of fact whether the property was or was not affected with a public interest.

It would extend this brief to unreasonable length to analyze all the cases decided by this court since Munn *vs.* Illinois, and would be but a "vain parade" since the latest decision by this court sets the matter at rest.

In Producers' Transportation Co. *vs.* Railroad Commission, 251 U. S., 228, this court, by Mr. Justice Van Devanter, says (p. 230):

> "It is, of course, true that if the pipe line was constructed *solely to carry oil for particular*

producers under strictly private contracts, and never was devoted by its owner to public use, that is, *to carrying for the public, the state could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility* or make its owner a common carrier; *for that would be taking private property for public use without just compensation*, which no state can do consistently with the due process of law clause of the Fourteenth Amendment."

The Undisputed Facts of Record in This Case Conclusively Show That Hirsh's Property Is Not Affected With a Public Interest, But Is Strictly Private Property.

Even if the mere legislative declaration that private property "is affected with a public interest" could be evidence of that fact, it could not be *conclusive*; otherwise the use of those six words in a statute could destroy all *private* ownership in the whole country. The record in this case conclusively shows that Hirsh's property was *not* affected with a public interest.

The undisputed facts are that Hirsh is the fee simple owner of the property. That his grantors, prior to the conveyance to Hirsh, leased the property to Block for the definite period of three years expiring December 31, 1919. That the lease contained a covenant against assignment or subletting; against its use except as a store for ladies' wear; a covenant to surrender possession at the expiration of the term; to pay a rental of $215 per month and that the lease should bind the heirs and assigns of the parties to it.

The record also shows that Block entered into possession under the lease, paid the rent and retained possession throughout the term demised and up to the present time, and that no one else was admitted or invited to tenancy thereof.

It is respectfully submitted that these facts conclusively show that the property has not been subjected to a public use but that it has been, ever since the execution of the lease, "private property" in the strictest sense.

In Weems Steamboat Company *vs.* Peoples Steamboat Company, 214 U. S., 345, one steamboat company sought to use a wharf on the Rappahannock River, which wharf was privately owned or leased by another company, on the theory that the wharf was subject to a public interest and open to public use. This court denied the right, and in disposing of the case, Mr. Justice Peckham said (p. 356):

> "The case of Munn *vs.* Illinois, 94 U. S., 113, 127, has, in our judgment, no bearing upon the question before us. . . . Their property was being used with their consent by and *its use devoted to the public to any extent desired*. . . . If the owner of one of these wharves had devoted it to the public use *and permitted the public to use it as it desired*, and demanded compensation for such use, the question as to the amount of such compensation might be raised as in the Munn class of cases, to be determined with reference to the reasonableness of the charge. But this is no such case. . . . The right to use the property has been withdrawn by the owner as to the public in general, including defendant. The only question is whether a third person has the right to use a private wharf on tendering reasonable compensation therefor, because there is no other wharf at the place, or because it would be more convenient to such third person to so use it or because the former owner of the wharf had permitted the public to use it, although the present owner refused to consent to such use. *There is no more reason why such property should be held subject to the right of others to use it against the will of its owner than there is for any other kind of property to be so held.*
>
> "The question as to the *right of the owner to*

exclude others from the use of a private wharf on a navigable stream has been very recently decided by this court in Louisville, etc., Railway Co. *vs.* West Coast Naval Stores Co., 198 U. S., 483, *and the right of such owner to exclude any or all other persons from the use of such wharves was affirmed.* The owner was not, it was also said, compelled to use the wharf *exclusively* for his own business or else to throw it open for the use of every one; *that he could not only use it himself and permit some others to use it, but might at the same time exclude still others to whom he did not choose to grant such right.*"

In Terminal Taxicab Co. *vs.* District of Columbia, 241 U. S., 252, the Taxicab Company conducted three classes of business—one was carrying passengers to and from the railroad station; another the carrying of guests of hotels, and a third furnishing automobiles from its garage on orders. This court held that this last class of business was not so affected with a public interest as to be within the power of regulation of the Utilities Commission, Mr Justice Holmes saying (p. 255):

> "The rest of the plaintiff's business, amounting to four tenths, consists mainly in furnishing automobiles from its central garage on orders, generally by telephone. It asserts the right to refuse the service and no doubt would do so if the pay was uncertain, but it advertises extensively and, we must assume, generally accepts any seemingly solvent customer. Still, *the bargains are individual*, and however much they may tend towards uniformity in price probably have not quite the mechanical fixity of charges that attends the use of taxicabs from the station and hotels. *There is no contract with a third person to serve the public generally.* . . .

(p. 256):

> "Although I have not been able to free my mind from doubt the court is of opinion that this part

of the business *is not to be regarded as a public utility.* It is true that all business, and for the matter of that, every life in all its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. But however it may have been in earlier days as to the common callings, it is assumed in our time that *an invitation to the public to buy does not necessarily entail an obligation to sell.* It is assumed that *an ordinary shopkeeper may refuse his wares arbitrarily to a customer whom he dislikes*, and although that consideration is not conclusive, German Alliance Ins. Co. *vs.* Kansas, 233 U. S., 389, 407, it is assumed that *such a calling is not public as the word is used.* In the absence of clear language to the contrary it would be assumed that an ordinary livery stable stood on the same footing as a common shop, and there seems to be no difference between the plaintiff's service from its garage and that of a livery stable. It follows that the plaintiff is not bound to give information as to its garage rates. . . .

"The decree so far as it asserts the jurisdiction of the commission is affirmed, but it must be modified so as to restrain an inquiry into the rates charged by the plaintiff at its garage, or the exercise of jurisdiction over the same."

It was contended in the court below that the universally admitted right of the legislature to regulate the rate of interest on loans of money was a recognition of the power to regulate purely private contracts between individuals. It may be said in this connection that interest statutes do not asume to *compel* the lending of money to particular persons nor the *continuation* of loans *after* they are due, on the condition that the interest be paid, as this legislation attempts to continue leases after their expiration.

But interest is a *creature of statute* and may be regulated or abolished by that power which gave it legal existence.

Lord Bacon, in his essay on Usury, after quoting various condemnations of it says:

> "I say this only, that usury is a 'concessum propter duritiem cordis:' for since there must be borrowing and lending, and men are so hard of heart as they will not lend freely, usury must be permitted."

In Lloyd *vs.* Scott, 4 Pet. 205, this court said, through Mr. Justice McLean (p. 224):

> "At an early period in the history of English jurisprudence, usury, or, as it was then called the loaning of money at interest, was *deemed a very high offense*. But since the days of Henry VIII, the taking of interest *has been sanctioned by statute*."

There is, therefore, no analogy between the case of a statute fixing rates of interest and one transferring the landlord's reversion to his tenant, without the consent of the landlord.

It is respectfully submitted that the legislation of Congress relied upon by Block is unconstitutional and void and that the judgment of the court below should be affirmed.

MYER COHEN,
RICHARD D. DANIELS,
WM. G. JOHNSON,
Counsel for Louis Hirsh.

APPENDIX.

LEGISLATION INVOLVED IN THE CASE.

1. Senate Joint Resolution Approved May 31, 1918 (40 Statutes at Large, p. 593), Known as the "Saulsbury Resolution."

Whereas by reason of the existence of a state of war, it is essential to the national security and defense, and for the successful prosecution of the war, to establish governmental control and assure adequate regulation of real estate in the District of Columbia for and during the period hereinafter set forth: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That until a treaty of peace shall have been definitely concluded between the United States and the Imperial German Government, unless in the meantime otherwise provided by Congress, no judicial order, decree, or judgment for the recovery of possession of any real estate in the District of Columbia, now or hereafter held or acquired by oral or written agreement of lease for one month or any longer period, or for the ejectment or dispossession of a tenant therefrom, shall be made, and all leases thereof shall continue so long as the tenant continues to pay rent at the agreed rate and performs the other conditions of the tenancy which are not inconsistent herewith, unless the tenant has committed waste, or has been guiity on the premises of conduct which constitutes a nuisance or a breach of the peace, or other misdemeanor or crime, or that the premises are necessarily

required by a landlord or bona fide purchaser for occupation either by himself or his wife, children, or dependents while he is in the employ of or officially connected with any branch of the Government, or where the property has been sold to a bona fide purchaser for his own occupancy; and where such order, decree, or judgment has been made, but not executed before the passage of this resolution, the court by which the order, decree, or judgment was made shall, if it is of the opinion that the order, decree, or judgment would not have been made if this resolution had been in force at the date of the making of the order, decree, or judgment, rescind or modify the order, decree, or judgment in such manner as the court may deem proper for the purpose of giving effect to this resolution; and all remedies, at law or in equity, of the lessor based on any provision in any oral or written agreement of lease that the same shall be determined or forfeited if the premises shall be sold are hereby suspended while this resolution shall be in force, and every purchaser shall take the conveyance of any premises subject to the rights of all tenants in possession thereof under the provisions of this resolution.

That the term "real estate" as herein used shall be construed to include any and all land, any building, any part of any building, house, or dwelling, any apartment, room, suite of rooms and every other improvement or structure whatsoever on land situated and being in the District of Columbia.

2. Amendment of "Saulsbury Resolution," Approved July 11, 1919 (41 Statutes at Large, p. 104).

SEC. 13. That the provisions of the joint resolution entitled "Joint resolution to prevent rent profiteering in the District of Columbia," approved May 31, 1918, are extended and continued in full force and effect for a

period of ninety days following the definite conclusion of a treaty of peace between the United States and the Imperial German Government.

3. Sections 101 to 122 Inclusive of the Act of Congress, Approved October 22, 1919 (41 Statutes at Large, pp. 298-304), Known as the "Ball Act."

TITLE II.—DISTRICT OF COLUMBIA RENTS.

SEC. 101. When used in this title, unless the context indicates otherwise—

The term "rental property" means any building or part thereof or land appurtenant thereto in the District of Columbia rented or hired and the service agreed or required by law or by determination of the commission to be furnished in connection therewith; but does not include an hotel or apartment.

The term "person" includes an individual, partnership, association, or corporation.

The term "hotel" or "apartment" means any hotel or apartment or part thereof, in the District of Columbia, rented or hired and the land and outbuildings appurtenant thereto, and the service agreed or required by law or by determination of the commission to be furnished in connection therewith.

The term "owner" includes a lessor or sublessor, or other person entitled to receive rent or charges for the use or occupancy of any rental property, hotel or apartment, or any interest therein, or his agent.

The term "tenant" includes a subtenant, lessee, sublessee or other person, not the owner, entitled to the use or occupancy of any rental property, hotel or apartment.

The term "service" includes the furnishing of light, heat, water, telephone or elevator service, furniture, furnishings, window shades, screens, awnings, storage, kitchen, bath and laundry facilities and privileges, maid

service, janitor service, removal of refuse, making all repairs suited to the type of building or necessitated by ordinary wear and tear, and any other privilege or service connected with the use or occupancy of any rental property, apartment, or hotel.

The term "commission" means the Rent Commission of the District of Columbia.

SEC. 102. A commission is hereby created and established, to be known as the Rent Commisson of the District of Columbia, which shall be composed of three commissioners, none of whom shall be directly or indirectly engaged in, or in any manner interested in or connected with, the real estate or renting business in the District of Columbia. The commissioners shall be appointed by the President by and with the advice and consent of the Senate. The term of each commissioner shall be two years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he succeeds. The commission shall at the time of its organization and annually thereafter elect a chairman from its own membership. The commission may make such regulations as may be necessary to carry this title into effect.

All powers and duties of the commission may be exercised by a majority of its members. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission. The commission shall have an official seal, which shall be judicially noticed.

SEC. 103. Each commissioner shall receive a salary of $5,000 a year, payable monthly. The commission shall appoint a secretary, who shall receive a salary of $3,000 a year, payable in like manner; and, subject to the provisions of the civil-service laws, it may appoint and remove such officers, employees, and agents and make such expenditures for rent, printing, telegrams,

telephone, law books, books of reference, periodicals, furniture, stationery, office equipment, and other supplies and expenses as may be necessary to the administration of this title. All of the expenditures of the commission shall upon the presentation of itemized vouchers therefor approved by the chairman of the commission be audited and paid in the same manner as other expenditures for the District of Columbia.

With the exception of the secretary, all employees of the commission shall be appointed from lists of eligibles supplied by the Civil Service Commission and in accordance with the civil-service law.

SEC. 104. The assessor of the District of Columbia shall serve ex officio as an advisory assistant to the commission, but he shall have none of the powers or duties of a commissioner. He shall attend the meetings and hearings of the commission. Every officer or employee of the United States or of the District of Columbia, whenever requested by the commission, shall supply to the commission any data or information pertaining to the administration of this title which may be contained in the records of his office. The assessor shall receive for the performance of the duties required by this section a salary of $1,000 per annum, payable monthly, in addition to such other salary as may be prescribed for his office by law.

SEC. 105. For the purposes of this title the commission or any officer, employee, or agent duly authorized in writing by it, shall at all reasonable times have access to, for the purpose of examination, and the right to copy, any books, accounts, records, papers, or correspondence relating to any matter which the commission is authorized to consider or investigate; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such books, accounts, records, papers, and

correspondence relating to any such matter. Any member of the commission may sign subpoenas, administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses and the production of such books, accounts, records, papers, and correspondence may be required from any place in the United States at any designated place of hearing. In case of disobedience to a subpoena or of the contumacy of any witness appearing before the commission, the commission may invoke the aid of the Supreme Court of the District of Columbia or of any district court of the United States. Such court may thereupon issue an order requiring the person subpoenaed to obey the subpoena, or to give evidence touching the matter in question. Any failure to obey such order of the court may be punished by such court as a contempt thereof. No officer or employee of the commission shall, unless authorized by the commission or by a court of competent jurisdiction, make public any information obtained by the commission.

SEC. 106. For the purposes of this title it is declared that all (a) rental property and (b) apartments and hotels are affected with a public interest, and that all rents and charges therefor, all service in connection therewith, and all other terms and conditions of the use or occupancy thereof, shall be fair and reasonable; and any unreasonable or unfair provision of a lease or other contract for the use or occupancy of such rental property, apartment, or hotel with respect to such rents, charges, service, terms, or conditions is hereby declared to be contrary to public policy. The commission upon its own initiative may, or upon complaint shall, determine whether the rent, charges, service, and other terms or conditions of a lease or other contract for the use or occupancy of any such rental property, hotel, or apartment are fair and reasonable. Such complaints may be made

(a) by or on behalf of any tenant, and (b) by any owner except where the tenant is in possession under a lease or other contract, the term specified in which has not expired, and the fairness and reasonableness of which has not been determined by the commission.

In all such cases the commission shall give notice personally or by registered mail and afford an opportunity to be heard to all parties in interest. The commission shall promptly hear and determine the issues involved in all complaints submitted to it. All hearings before the commission shall be open to the public. If the commission determines that such rents, charges, service, or other terms or conditions are unfair or unreasonable, it shall determine and fix such fair and reasonable rent or charges therefor, and fair and reasonable service, terms, and conditions of use or occupancy. In any suit in any court of the United States or the District of Columbia involving any question arising out of the relation of landlord and tenant with respect to any rental property, apartment, or hotel, except on appeal from the commission's determination as provided in this title, such court shall determine the rights and duties of the parties in accordance with the determination and regulations of the commission relevant thereto.

SEC. 107. A determination of the commission fixing a fair and reasonable rent or charge made in a proceeding begun by complaint shall be effective from the date of the filing of the complaint. The difference between the amount of rent and charges paid for the period from the filing of the complaint to the date of the commission's determination and the amount that would have been payable for such period at the fair and reasonable rate fixed by the commission may be added to or subtracted from, as the case demands, future rent payments, or after the final decision of an appeal from the commission's determination may be sued for and recovered in an

action in the Municipal Court of the District of Columbia.

SEC. 108. Unless within ten days after the filing of the commission's determination any party to the complaint appeals therefrom to the Court of Appeals of the District of Columbia, the determination of the commission shall be final and conclusive. If such an appeal is taken from the determination of the commission, the record before the commission or such part thereof as the court may order shall be certified by it to the court and shall constitute the record before the court, and the commission's determination shall not be modified or set aside by the court, except for error of law. If any party applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as the court may deem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which shall be conclusive, and its recommendations if any for the modification or setting aside of its original determination, with the return of such additional evidence. In the proceedings before such court on appeal from a determination of the commission, the commission shall appear by its counsel or other representative and submit oral or written arguments to support the findings and the determination of the commission.

SEC. 109. The right of a tenant to the use or occupancy of any rental property, hotel or apartment, existing at the time this Act takes effect, or thereafter ac-

quired, under any lease or other contract for such use or occupancy or under any extension thereof by operation of law, shall, notwithstanding the expiration of the term fixed by such lease or contract, continue at the option of the tenant subject, however, to any determination or regulation of the commission relevant thereto; and such tenant shall not be evicted or dispossessed so long as he pays the rent and performs the other terms and conditions of the tenancy as fixed by such lease or contract, or in case such lease or contract is modified by any determination or regulation of the commission, then as fixed by such modified lease or contract. All remedies of the owner at law or equity, based on any provision of any such lease or contract to the effect that such lease or contract shall be determined or forfeited if the premises are sold, are hereby suspended so long as this title is in force. Every purchaser shall take conveyance of any rental property, hotel, or apartment subject to the rights of tenants as provided in this title. The rights of the tenant under this title shall be subject to the limitation that the bona fide owner of any rental property, apartment, or hotel shall have the right to possession thereof for actual and bona fide occupancy by himself, or his wife, children, or dependents, or for the purpose of tearing down or razing the same in order immediately to construct new rental property, hotel, or apartment if approved by the commission, upon giving thirty days' notice in writing, served in the manner provided by section 1223 of the Act entitled "An Act to establish a code of laws for the District of Columbia," approved May 3, 1901, as amended, which notice shall contain a full and correct statement of the facts and circumstances upon which the same is based; but in no case shall possession be demanded or obtained by such owner in contravention of the terms of any such lease or contract. If there is a dispute between the owner and the tenant as to the accuracy or sufficiency

of the statement set forth in such notice, as to the good faith of such demand, or as to the service of notice, the matters in dispute shall be determined by the commission upon complaint as provided in section 106 of this title.

SEC. 110. Pending the final decision on appeal from a determination of the commission, the commission's determination shall be in full force and effect and the appeal shall not operate as a supersedeas or in any manner stay or postpone the enforcement of the determination appealed from. Immediately upon the entry of a final decision on the appeal the commission shall, if necessary, modify its determination in order to make it conform to such decision. The difference, if any, between the amount of rent and charges paid for the period from the date of the filing by the commission of the determination appealed from and the amount that would have been payable for such period under the determination as modified in accordance with the final decision on appeal may be added to or allowed on account of, as the case demands, future rent payments or may be sued for and recovered in an action in the Municipal Court in the District of Columbia.

SEC. 111. The determination of the commission in a proceeding begun by complaint or upon its own initiative fixing fair and reasonable rents, charges, service, and other terms and conditions of use or occupancy of any rental property, hotel, or apartment shall constitute the commission's determination of the fairness and reasonableness of such rents, charges, service, terms, or conditions for the rental property, hotel, or apartment affected, and shall remain in full force and effect notwithstanding any change in ownership or tenancy thereof, unless and until the commission modifies or sets aside such determination upon complaint either of the owner or of the tenant.

SEC. 112. If the owner of any rental property, apartment, or hotel collects any rent or charge therefor in excess of the amount fixed in a determination of the commission made and in full force and effect in accordance with the provisions of this title, he shall be liable for and the commission is hereby authorized and directed to commence an action in the Municipal Court in the District of Columbia to recover double the amount of such excess, together with the costs of the proceeding which shall include an attorney's fee of $50, to be taxed as part of the costs. Out of any sums received on account of such recovery the commission shall pay over to the tenant the amount of the excess so paid by him and the balance shall be paid into the Treasury of the United States to the credit of the District of Columbia: *Provided*, That if the commission finds that such excess was paid by the tenant voluntarily and with knowledge of the commission's determination, the whole amount of such recovery shall be paid into the Treasury of the United States to the credit of the District of Columbia.

SEC. 113. If in any proceeding before the commission, begun by complaint or on the commission's own initiative, and involving any lease or other contract for the use or occupancy of any rental property, hotel, or apartment the commission finds that at any time after the passage of this Act but during the tenancy the owner has, directly or indirectly, willfully withdrawn from the tenant any service agreed or required by a determination of the commission to be furnished, or has by act, neglect, or omission contrary to such lease or contract or to the law or any ordinance or regulation made in pursuance of law, or of a determination of the commission, exposed the tenant, directly or indirectly, to any unsafe or insanitary condition or imposed upon him any burden, loss, or unusual inconvenience in connection with his use or occupancy of such rental property, hotel, or apartment, the commis-

sion shall determine the sum which in its judgment will fairly and reasonably compensate or reimburse the tenant therefor. In any such proceeding involving a lease or other contract, the term specified in which had not expired at the time the proceeding was begun, the commission shall likewise determine the amount or value of any bonus or other consideration in excess of the rental named in such lease or contract received at any time directly or indirectly by the owner in connection with such lease or contract. The tenant may recover any amount so determined by the commission in an action in the Municipal Court of the District of Columbia.

SEC. 114. Whenever under this title a tenant is entitled to bring suit to recover any sum due him under any determination of the commission, the commission shall, upon application by the tenant and without expense to him, commence and prosecute in the municipal court of the District of Columbia an action on behalf of the tenant for the recovery of the amount due, and in such case the court shall include in any judgment rendered in favor of the tenant the costs of the action, including a reasonable attorney's fee, to be fixed by the court. Such costs and attorney's fee when recovered shall be paid into the Treasury of the United States to the credit of the District of Columbia.

SEC. 115. The commission shall, by general order from time to time prescribe the procedure to be followed in all proceedings under its jurisdiction. Such procedure shall be as simple and summary as may be practicable, and the commission and parties appearing before it shall not be bound by technical rules of evidence or of pleading.

SEC. 116. Any person who with intent to avoid the provisions of this title enters into any agreement or arrangement for the payment of any bonus or other consideration in connection with any lease or other contract for the use or occupancy of any rental property,

hotel, or apartment, or who participates in any fictitious sale or other device or arrangement the purpose of which is to grant or obtain the use or occupancy of any rental property, hotel, or apartment without subjecting such use or occupancy to the provisions of this title or to the jurisdiction of the commission shall upon conviction be punished by a fine not exceeding $1,000 or by imprisonment for not exceeding one year or by both.

SEC. 117. The commission shall prescribe standard forms of leases and other contracts for the use or occupancy of any rental property, hotel, or apartment and shall require their use by the owner thereof. Every such lease or contract entered into after the commission has prescribed and promulgated a form for the tenancy provided by such lease or contract shall be deemed to accord with such standard form; and any such lease or contract in any proceeding before the commission or in any court of the United States or of the District of Columbia shall be interpreted, applied, and enforced in the same manner as if it were in the form and contained the stipulations of such standard form.

The owner of an hotel or apartment shall file with the commission plans and other data in such detail as the commission requires, descriptive of the rooms, accommodations and service in connection with such hotel or apartment, and a schedule of rates and charges therefor. The commission shall, after consideration of such plans, schedules, data, or other information, determine and fix a schedule of fair and reasonable rates and charges for such hotels or apartments; and the rates and charges stated in such schedule shall thereafter constitute the fair and reasonable rates and charges for such hotel or apartment. The commission's determination in such case shall be made after such notice and hearing and shall have the same force and effect and be subject to appeal in the same manner as a determination of the commission under section 106 of this title.

SEC. 118. No tenant shall assign his lease of or sublet any rental property or apartment at a rate in excess of the rate paid by him under his lease without the consent of the commission upon application in a particular case, and in such case the commission shall determine a fair and reasonable rate of rent or charge for such assignment or sublease.

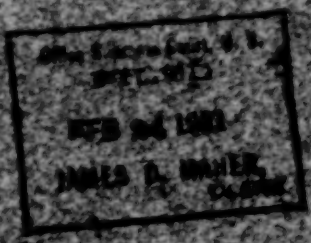
SEC. 119. The public resolution entitled "Joint resolution to prevent profiteering in the District of Columbia," approved May 31, 1918, as amended, is hereby repealed, to take effect sixty days after the date of the confirmation by the Senate of the commissioners first nominated by the President under the provisions of this title; but a determination by the commission made within such period of sixty days shall be enforced in accordance with the provisions of this title, notwithstanding the provisions of such public resolution. All laws or parts of laws in conflict with any provision of this title are hereby suspended so long as this title is in force to the extent that they are in such conflict.

SEC. 120. The sum of $50,000, or so much thereof as may be necessary, is hereby appropriated and made immediately available to carry out the provisions of this title, one-half thereof to be paid out of money in the Treasury of the United States not otherwise appropriated and the other one-half out of the revenues of the District of Columbia.

SEC. 121. If any clause, sentence, paragraph, or part of this title shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof but shall be confined in its operations to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

SEC. 122. It is hereby declared that the provisions of this title are made necessary by emergencies growing out

of the war with the Imperial German Government, resulting in rental conditions in the District of Columbia dangerous to the public health and burdensome to public officers and employees whose duties require them to reside within the District and other persons whose activities are essential to the maintenance and comfort of such officers and employees, and thereby embarrassing the Federal Government in the transaction of the public business. It is also declared that this title shall be considered temporary legislation, and that it shall terminate on the expiration of two years from the date of the passage of this Act, unless sooner repealed.



No. 640.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

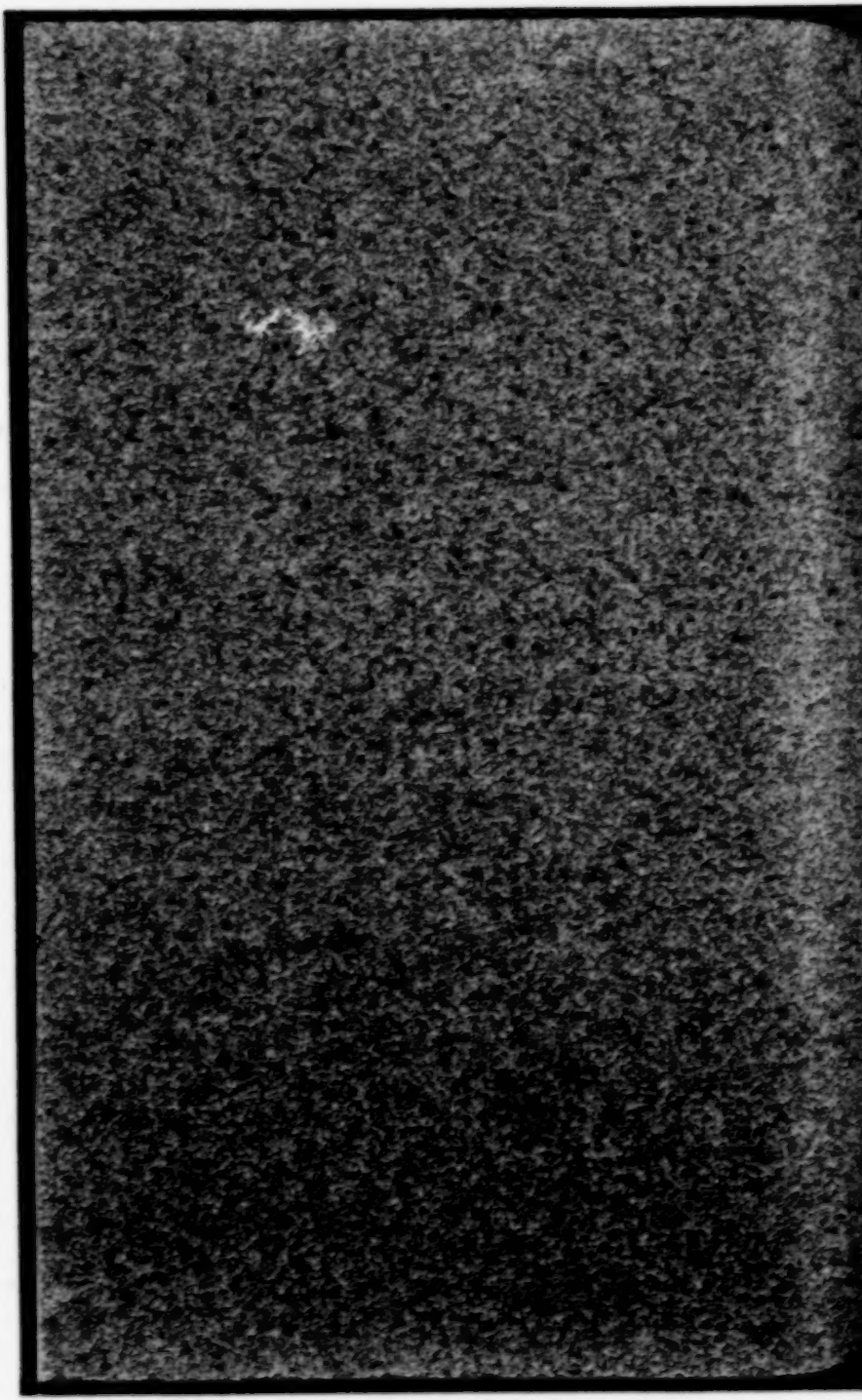
JULIUS BLOCK, PLAINTIFF IN ERROR,

v.

LOUIS HIRSH, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF, BY LEAVE OF COURT, ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE, IN SUPPORT OF THE CONSTITUTIONALITY OF THE AMENDMENT OF OCTOBER, 1919'S ACT.



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LIST OF CITATIONS.

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ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF THE UNITED STATES AS AMICUS CURIAE.

STATEMENT.

This case involves the constitutionality of the District of Columbia rents law, forming Title II of the act approved October 22, 1919, amending the Food Control (Lever) Act (41 Stat., c. 80, p. 298). This statute, which is confessedly emergency legislation expiring in two years from its enactment, contains a recital that its provisions were—

> made necessary by emergencies growing out of the war * * * resulting in rental conditions in the District of Columbia dangerous to the public health and burdensome to public officers and employees * * * and thereby embarrassing the Federal Government in the transaction of the public business. (Id. p. 304, sec. 122.)

Declaring all rental property under these exceptional circumstances to be affected with a public interest, the statute requires that all rents and charges therefor, all services in connection therewith, and all other terms and conditions of the use and occupation thereof shall be fair and reasonable, and accordingly commits the application of the standard thus established to a Rent Commission provided with the proper procedural machinery for determining the question in each case, subject to review by the Court of Appeals. As an incident to the regulation of rents and charges, the existing occupancy of a tenant not in default is continued during the limited period of the act's operation, subject to, and conditioned upon, payment of reasonable rent.

The present case arises upon the possessory feature of the act. It involves no question of fair rent, nor does it present for review any action of the Rent Commission. The District Court of Appeals, however (the Chief Justice dissenting), held the statute to be unconstitutional and totally void. (Rec. p. 25; 267 Fed. 614.) The majority opinion involved in common ruin the rent-regulatory as well as the occupancy provisions of the act, nor did it attempt to draw any distinction between business property such as that actually in dispute, and buildings used for habitation, whether dwellings, apartments, or hotels.

The consequence has been that landlords in general have ignored the commission's findings with respect to reasonable rentals, hotel and apartment-house pro-

prietors have refused to supply information required by the act for the determination of schedules of fair and reasonable rates, and the courts of the District are flooded with hundreds of dispossession cases brought upon the theory that the whole act is a nullity and the Rent Commission nonexistent. Hence it may be truly said that the importance of this case lies rather in its effect as a complete nullification of the legislative effort to meet the exigencies of an abnormal housing situation than in the disposition of the immediate controversy between the two parties on the record.

How the constitutional questions arise.

As for the controversy on the record, the facts are few and apparently undisputed. A statement of them is made only to show how the constitutional questions are deemed to arise.

On December 1, 1916, the premises in dispute—a retail store—were leased to the plaintiff in error, Block, for a three-year term, commencing January 1, 1917. On November 13, 1919 (after the passage of the Rents Act), the defendant in error, Hirsh, purchased the property and received an assignment of the lease. He notified Block of the fact and that he would require possession when the term expired on December 31, 1919. Block refused to surrender on the expiration of the term. Hirsh then brought a summary landlord and tenant proceeding in the Municipal Court. Restitution being denied, an appeal was taken to the District Supreme Court, where such

cases are tried *de novo*. Under a rule of that court, Hirsh filed an affidavit for summary judgment, asserting right to possession because of the expiration of Block's tenancy. (Rec. 11.) In his counter affidavit, Block set up the Rents Act. (Rec. 13.) The points taken were that being in possession as lessee, he was entitled by force of the statute to remain, notwithstanding the expiration of the term, that Hirsh had purchased subject to Block's rights under the statute, one of the provisions of which was that an owner of rental property must give a 30 days' notice to quit, stating facts which would entitle him to possession under the exceptional conditions specified in the act, and that no such notice had been given. Hirsh moved for judgment upon the ground that the provisions relied on were unconstitutional. In holding the defense good and overruling the motion for summary judgment, the court (for some reason not apparent on the record) entered judgment for the defendant without any trial of the issue. (Rec. 15.) From the judgment thus irregularly entered, Hirsh appealed. It was in the disposition of his appeal that the Court of Appeals, as already stated, held the Rents Act as a whole to be unconstitutional and void. When the case went back, Block filed a new affidavit setting up somewhat more artificially the defense made before, supplementing it with certain averments designed to show that the whole building, and not merely the floors occupied by his stores had been for many years *rental* property within the mean-

ing of the act. (Rec. 18.) Hirsh, of course, had judgment in conformity with the opinion of the Court of Appeals. The judgment was affirmed without further opinion. (Rec. 14.) The case was then brought here.

Thus it would appear that this record raises the validity of the Rents Act in this way and to this extent only: Hirsh is entitled to recover possession by reason of the expiration of the demise, unless the Rents Act has clothed Block with a right to remain in possession, during the limited statutory period, conditioned upon, and subject to, the payment of such fair and reasonable rent as the Rent Commission, upon Hirsh's application or its own initiative, may fix in lieu of the agreed rent. It follows that while an adjudication in Block's favor would affirm the existence of the legislative power to regulate rents, an adjudication in Hirsh's favor would not necessarily deny it. Although the power temporarily to continue existing occupancy may be dependent upon the power to regulate rents, the converse is not true. Power to regulate rents is not dependent upon the power to continue occupancy.

We shall endeavor to show that Congress possesses both the rent-regulating power, and, as an incident thereof, the power to continue an existing occupancy upon reasonable compensation. But it seems important to emphasize that judgment for the restitution of the Hirsh store does not necessarily negative legislative power to regulate rents. It is perhaps

unfortunate that this court does not also have before it one of the many cases pending in the court below, which illustrate the actual operation of the regulatory provisions of the statute, and present for review concrete determinations of the Rent Commission reducing to a reasonable basis, allowing a fair return on the investment, rents shown to be grossly extortionate, and, in many instances, to yield *net* returns above 25 per cent on the contemporaneous purchase price.

Analysis of the act.

The District Rents Act contains a statement that it "shall be considered temporary legislation," and provides further that it shall terminate at the expiration of two years from its date. (Sec. 122.) The social and economic circumstances which occasioned its enactment are also expressly stated:

> SEC. 122. It is hereby declared that the provisions of this title are made necessary by emergencies growing out of the war * * * resulting in rental conditions * * * dangerous to the public health and burdensome to public officers and employees whose duties require them to reside within the District, and other persons whose activities are essential to the maintenance and comfort of such officers and employees, and thereby embarrassing the Federal Government in the transaction of public business.

The statute formally divides its subject matter into two distinct, though obviously cognate, classes, viz, (a) rental property other than hotels or apart-

ments, and (b) apartments and hotels. (Sec. 106.) The former is defined to be—

> any building or part thereof or land appurtenant thereto * * * rented or hired and the service agreed or required * * * to be furnished in connection therewith. (Sec. 101.)

Congress then proceeds to declare the fact to be that both of these classes of property are affected with a public interest and accordingly enacts that "all rents and charges therefor, all service in connection therewith, and all other terms and conditions of the use or occupancy thereof shall be fair and reasonable." (Sec. 106.)

The means employed to protect the public interest thus recognized are threefold:

(1) Having itself laid down the requirement of reasonableness just stated, Congress creates a commission and confers upon it power to—

> determine whether the rent, charges, service, and other terms or conditions of a lease or other contract for the use or occupancy of any such rental property, hotel, or apartment are fair and reasonable * * * If the commission determines that such rents, charges, service, or other terms or conditions are unfair or unreasonable, it shall determine and fix such fair and reasonable rent or charges therefor, and fair and reasonable service, terms, and conditions of use or occupancy. (Sec. 106.)

Most of the text is taken up with sections concerning the machinery for the exercise of this regulatory power. They will be hereafter examined in detail. It is enough to say now that solicitous provision is made for notice and hearing, compulsory as well as voluntary attendance of witnesses and production of documents and for the full development by means of open examination and cross-examination of all relevant facts. (Secs. 105, 106.) Every determination of the commission moreover is subject to review for error of law by the Court of Appeals. (Sec. 108.)

The commission's authority to determine fair and reasonable rentals or terms and conditions of occupancy may be exercised upon its own initiative or upon complaint made either by the tenant or by the owner except as against a tenant in possession for a term not yet expired. (Sec. 106.) In a proceeding begun by complaint, a determination fixing a fair and reasonable rent, becomes effective from the date of the complaint, and remains in force until abrogated or modified by authority. The difference between the amount actually paid for the period from the complaint to the commission's determination, and the amount payable at the rate fixed by them, may be added to, or (if the rent be lowered) subtracted from future rent payments. After the final decision of an appeal from the commission's determination, such difference may also be recovered by action. (Sec. 107.)

In this aspect, it will be observed, the statute operates only upon the rental or charge for the use of the specified classes of property and the terms and conditions of such use. Possession is not affected.

(2) The statute's second mode of operation is in the protection, for a limited time and upon stated conditions, of existing occupancy. Section 109 provides that—

> The right of a tenant to the use or occupancy of any rental property, hotel or apartment existing at the time this act takes effect or thereafter acquired under any lease or other contract for such use or occupancy, or under any extension thereof by operation of law, shall, notwithstanding the expiration of the term fixed by such lease or contract, continue at the option of the tenant, subject, however, to any determination or regulation of the commission relevant thereto.

The protection thus given the existing occupancy of a tenant is subject, however, to an important limitation. The owner has the right to regain possession—

> for actual and bona fide occupancy by himself or his wife, children, or dependents, or for the purpose of tearing down or razing the same in order immediately to construct new rental property, hotel or apartment, if approved by the commission. (Sec. 109.)

In other words, property placed by the owner's act in the category of rental property may be withdrawn

from that class, and thus from the operation of the statute, whenever the owner really desires to use the property himself or to improve it in order to place it again on the rental market. The withdrawal is accomplished by a 30 days' notice to quit, containing a statement of the facts showing the owner's purpose. The commission is empowered to pass upon the accuracy and sufficiency of the notice and the good faith of the demand.

(3) The statute's third mode of operation is upon remedies. The substantive right to continued occupancy upon payment of reasonable compensation is protected by providing that so long as the tenant "pays the rent and performs the other terms and conditions of the tenancy" as fixed by contract, or as modified by the decision of the commission, he is not to be evicted or dispossessed. (Sec. 109.)

Remedies based on any stipulation that the lease shall be forfeited if the premises are sold are suspended. Purchasers take subject to the tenant's right. Where the agreed term has expired, a possessory remedy is available only when the landlord has given notice stating facts which, if true, would bring the owner within one of the stated exceptions authorizing recovery of possession notwithstanding the occupant's willingness to continue at a fair rent. Any dispute concerning the accuracy of the statement, moreover, is committed to the determination of the commission, subject to review by the Court of Appeals. (Sec. 109.) And such determination is made conclusive in any suit "involving any question

arising out of the relation of landlord and tenant with respect to" the property in question. (Sec. 106.)

The effect of these provisions, therefore, is not to abolish the statutory summary landlord and tenant remedy, or any other possessory remedy. Such remedies are still open to the landlord whenever the tenant's interest has determined by default in payment of the agreed rent, unless the commission has found some other amount to be fair and reasonable, and in that event, whenever the tenant has defaulted in the payment of the rent so fixed. The same is true in case of breach of any other covenant or condition giving rise to a forfeiture. But, in the case of an expired demise, or a monthly tenancy previously determinable upon 30 days' notice, the effect of the Rents Act is to suspend the possessory remedy during the life of the act, as to all landlords who can not bring themselves within the excepted class of owners desiring to use personally or to improve for renting.

We understand that counsel for defendant in error will take the position that this case can be made to turn upon the legislative power to suspend, modify, or annex conditions to any existing remedy. We find ourselves unable to share that view. The question whether, in respect of possessory remedies, a distinction can be drawn between owners in general and owners who can bring themselves within the specified class is, in our judgment, simply another form of the fundamental question of classification involved in the substantive parts of the act. The

real question is whether Congress, having classified buildings according to their use into rental and non-rental property, can protect existing occupancy of premises belonging to the former class upon payment of reasonable charges, until, by the owner's act, such property is transferred to the latter class. Though in form a determination of the sufficiency of a notice preliminary to a remedy, the action of the commission is in substance a determination of the class to which the property belongs. The procedural notice requirement is but a means of protecting the substantive right of continued occupancy resulting from the act, and must stand or fall with it.

Separable features.

It is important to note, however, that this suspension or limitation of previous possessory remedies forms no essential part of the process of regulating rentals. It is connected only with the provisions for continuance of occupancy, which are themselves severable. While all the provisions of the statute are directed towards the same general legislative purpose, there is no necessary connection between its two main substantive modes of operation. Congress, undoubtedly, had this in mind when with studious care it provided that the invalidity of any one part should not affect the remainder of the act. (Sec. 121.) Regulation of the price chargeable for a use neither depends upon, nor requires, the recognition of a right to continue such use beyond the term agreed upon between the occupant and the

owner. Charges may be regulated, although the public has no legal right to demand the service. *German All. Ins. Co.* v. *Kansas*, 233 U. S. 389, 407. The rental provisions can readily stand as an independent act. Congress might well have contented itself (as did the Wisconsin Legislature in its Rents Act) with providing means for determining the fairness and reasonableness of rents without touching the owner's right to resume possession upon the expiration of a tenancy. Manifestly there is little advantage in ousting a willing tenant if a higher rent can not be exacted of a new one.

ARGUMENT.

ORDER OF DISCUSSION.

It is quite obvious that the heart of this statute lies in the *regulation of rental charges* as matters which have become affected with a public interest. The *first* question, therefore, is whether Congress possesses that power. If the power be established, the inquiry will be, *secondly*, whether the machinery and procedure devised for applying and enforcing the standard of reasonableness satisfy the requirements of due process; and *thirdly*, whether the operation of the statute in respect of occupancy is a reasonable corollary of the power to regulate and an appropriate means of making it effective.

It may be added that the penalty and other auxiliary features of the act are so clearly separable that no question has been made concerning their effect on the act's validity.

PROPOSITIONS.

The views which, under these heads, we beg leave to submit in support of this legislation, may be broadly stated in the form of the following propositions:

I. A declaration by Congress that emergencies growing out of the war have caused apartments, hotels, and other rental property at the seat of government to be affected with a public interest, and therefore subject to regulation, is conclusive, not only in respect of the conditions of fact found, but in respect of the conclusion drawn therefrom, unless that conclusion be essentially absurd and such as no rational mind could draw.

II. The conclusion drawn by Congress that, under the circumstances found, the relation between the owners and the users of such property could not be safely left to the uncontrolled and unregulated action of private economic interest, so far from being irrational or absurd was a sound legislative judgment supported by a large body of enlightened opinion and shared by other responsible legislatures forced to deal with similar conditions in areas of congested population.

III. The public interest thus recognized may be legitimately protected by regulating, on the basis of a fair and reasonable charge, the compensation or rental to be paid for use of such property by persons let into possession by the owners.

IV. The power of regulation may be exercised through a board or tribunal, such as the District

Rent Commission, authorized, upon due notice and hearing, to apply in each case the standard of reasonableness established by the legislature.

V. None of the detailed provisions in this act for the execution of the power of regulation is lacking in any element of due process.

VI. That, as a corollary to the power of regulation and as an appropriate means of giving it effect, the existing occupancy of a tenant duly performing all other conditions, may be continued subject to, and conditioned upon, payment of fair and reasonable rent as determined by public authority after notice and hearing, so long as the owner leaves the building in the rental class and does not withdraw it for individual use or for reconstruction.

VII. That, in respect of property left in the rental class, such temporary continuance of occupancy during a public emergency upon payment of reasonable rental and the other conditions and limitations prescribed by this statute is a valid exercise of the police power.

(*a*) As such, it does not infringe liberty of contract. (*b*) Nor, when the rental is fixed by public authority after notice and hearing, subject to judicial review, and is not shown to deny a reasonable return on the fair value of the owner's property, does it constitute a taking without just compensation or a deprivation of property without due process of law.

VIII. That, in any event, the possessory operation of this act is logically separable from its regulatory

operation, and Congress has expressly declared its intent that the various features of the legislation shall stand independently of each other. If, for any reason, the possessory provisions be invalid, such invalidity is without effect upon the provisions for the regulation of rents.

First Point.

In the emergency declared by Congress, regulation of rents is a valid exercise of the police power.

It seems superfluous to demonstrate by accumulated citations of the decisions of this court that the judiciary possesses no reagent by which to test the soundness of a legislative conviction that a given use of property, or a given business relation, is affected with a public interest and for that reason, subject to regulation. *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, 411.

In view of the many recent applications of the principle to activities hitherto unregulated, such as employment agencies (*Brazee* v. *Michigan*, 241 U. S. 340, 343), banking (*Noble State Bank* v. *Haskell*, 219 U. S. 104, 112), insurance and the collection of news, and many aspects of the employer and employee relation (*Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 238), it has become a truism to say that the scope of legislative authority in this field can not be expressed in any formula (*Hudson Co. W. Co.* v. *McCarter*, 209 U. S. 349, 355), but must be left to be worked out, as in all applications of the police power, by the gradual process of inclusion and exclu-

sion, in conformity with the ever-changing conditions of society. *Budd* v. *New York*, 143 U. S. 517, 534. Whether a given economic relation may be safely left to uncontrolled private activity, or needs to be regulated in respect of practices or charges, depends upon the extent to which the increasing complexity and interdependence of civilized life has heightened its reactions upon society in general, and thus made its right conduct an object of positive public concern. There is, and in the nature of things can be, no other criterion.

The field of inquiry therefore is not so much juridical as social and economic. Whether the stress of the situation has risen to the required height is a question of judgment. The answer is one which the lawmaking power in the State—assuming its reasoning faculties to be unimpaired—is alone competent to make. *Price* v. *Illinois*, 238 U. S. 446, 451; *Rast* v. *Van Deman*, 240 U. S. 342, 365.

It follows, then, that to deny Congress power to regulate rents and conditions of occupancy under the existing housing situation in the District of Columbia is, in effect, to assert that the police power can never, under any conceivable circumstances, extend to that subject. For if rents be subject to control in any case whatever, the Congressional declaration that their regulation at the seat of government is essential to public health and the unembarrassed transaction of the public business must be conclusive. "We must assume

that if a state of facts could exist that would justify such legislation, it actually did exist when the the statute under consideration was passed." *Munn* v. *Illinois*, 94 U. S. 113, 132.

I. PUBLIC INTEREST IN USES OF LAND.

We therefore posit, as the basis of discussion, the proposition that a legislative declaration, such as is embodied in this act, must be accepted as conclusive, not merely in respect of the facts, but in respect of the legislative conclusion deduced therefrom, unless that conclusion is demonstrably irrational and absurd. How is it possible for any opponent of this legislation to meet the burden thus cast upon him? It is not unfair to say that so far no serious effort has been made to do so. On the contrary, the argument against this statute proceeds upon an extreme individualistic conception of real property which, in effect, *denies the existence* of any police power in respect thereof. It is historically, economically and legally unsound. It treats property in land (that is to say, the hitherto recognized interests in land) as being in its essential nature absolute. The whole argument for the defendant in error, for example, goes upon the ground that when a tenant's estate in the demised premises comes to an end by expiration of the term, the landlord's right to enjoy and possess the property is in its nature absolute. From that moment, it is said, he has a right to let the property anew to another tenant at the same or a higher rent, or to

occupy it himself and not lease it to anyone, and if, during the term, he has sold the property to another, his vendee has the same unqualified right of immediate enjoyment.

What has all this to do with the power of rent regulation? Obviously, the argument is nothing but a statement of the hitherto recognized incidents of an estate in reversion after a term of years. Whether these incidents are beyond the reach of the lawmaking power can not be determined by merely stating them as they now exist. It is necessary first to see what are the social effects, under the existing emergency, of leaving the existing relation between the owner of the reversion and the lessee uncontrolled. When that is done, the inquiry will be, not whether the regulation of that relation alters or impairs the incidents of the reversion, but whether it takes away the essential property right of the reversioner. Thus the argument against the act begins at the wrong end. The real question is whether an owner of a building not used by himself has, under whatsoever economic and social stress, an absolute inherent and indestructible right to grant such use only upon such terms, for such price, during such time, and to such person as he may choose, immune from the possibility of any regulating control whatever. To affirm that such is the case is but to assert, contrary to fundamental conceptions of the common law, that private ownership in land is absolute.

Let us look a little more closely at the relation which is thus held up as immune from legislative

regulation. Even if the conception suggested were not historically unsound, it would be a palpable anachronism in the life of a modern city.

When the owner of a building designed for human habitation does not use it himself, but offers to exchange its use in return for a money compensation, he becomes, under the conditions of modern urban existence, the purveyor of a commodity which, like food, is a primary necessary of life. He becomes a vendor of habitation space. In the relation thus constituted, there is nothing essentially personal. The commodity is offered substantially to all comers, the only condition being payment of the price demanded and acceptance of certain common and usual conditions which custom in each community has reduced to practical uniformity.

Such being the actual relation, it is manifestly impossible to say that the prices to be charged for the exchange of this commodity are exempt by their very nature from all possibility of legislative regulation, no matter what may be the stress of the existing economic situation or the effect upon the operations of Government itself.

Such a notion would have altered the entire history of the common law. The very things to which Hale first applied the term "affected with a public interest"—wharfage, cranage, anchorage, and the like—are all perceived "in respect of the propriety of the soil." Each is but an exchange of the use of land against a price. Nor is such a conception to be reconciled with the long list of

mill-dam acts collected in the opinion in *Head* v. *Amoskeag Mfg. Co.*, 113 U. S. 9, 17–18. For they authorize private lands—not structures—to be not only flowed in invitum but actually taken for the use of other private parties. *Turner* v. *Nye*, 154 Mass. 579, 582. It is immaterial whether these statutes are considered as resting on the right of eminent domain (113 U. S. p. 19), or upon the power to regulate use even to the extent of coercing it upon fair compensation where the public interest so requires (113 U. S. pp. 24–26). *Murdock* v. *Stickney*, 8 Cush. 113, 116. They embody the principle of the subordination of ownership to utilization, where, under the given social circumstances, use by others than the proprietor is essential to the maintenance of general living conditions or increases the productive power or economic welfare of any considerable part of the population. It is significant that the constitutionality of these acts was never questioned until the economic necessity which occasioned them had ceased. *Jordan* v. *Woodward*, 40 Me. 317, 323. Though generally sustained even in a period of extreme *laissez-faire*, some courts felt impelled to do so because of "great antiquity and long acquiescence"—as if antiquity and acquiescence were not cogent evidence that the *general power* to deal with property in the same way had been left unimpaired by the Federal and State constitutions. These cases are referred to chiefly because much of the argument against this act proceeds from a refusal to recognize that the basic

concept of the subordination of ownership to public utilization underlies the exercise of sovereignty in the form both of eminent domain and the police power.

Howsoever it may be classified, the power itself is habitually exercised in irrigation and other statutes authorizing private property to be taken by other individuals upon fair compensation for uses which, though primarily private, are thought to affect the economic life of the whole community. *Vetter* v. *Broadhurst*, 9 Am. L. Rep. 578. It has thus come to be well established that real property may, under special circumstances of grave general concern, become so far affected with a public interest that uses which, in their immediate purpose, are private, must be regarded as public. Such was the principle applied by this court to the Utah statutes which permit an individual to condemn rights of way over other lands for irrigating his own, or "for tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting or other reduction of ores."

Clark v. *Nash*, 198 U. S. 361, sustained the legislation in respect of expropriation for the purpose of conveying water in ditches to irrigate other land in private ownership. In *Strickley* v. *Highland Boy Min. Co.*, 200 U. S. 527, its validity was sustained in respect of the condemnation of a strip required for an aerial bucket line supported on movable towers for the transportation of ore from a private mine to a railway station. These cases are highly significant

here, because both recognize that use by the public at large is not the sole or universal test in these matters, and that there are—

> special times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent. 200 U. S., 531.

According to the traditional view, each of these cases was a clear instance of property being taken for private use. (196 U. S. 368.) Yet, under the peculiar conditions there prevailing, each was so bound up with the welfare, growth and prosperity of the State that the economic advantage accruing to the individual was regarded as constituting in its ultimate effect a public use.

It will be said that those are cases of expropriation and not of regulation. But is not the underlying consideration the same? If the general welfare can, under special circumstances, become so bound up with the development of a particular industry as to justify the condemnation of the property of one person in order to enable another person more successfully to conduct his business, it is equally manifest that a like power to regulate must exist where the use of certain classes of property is so bound up with the characteristic life of the community and the operations of Government that both will suffer utter disorganization unless fair and stable conditions are maintained in respect of the terms

of such use. *The public interest which justifies expropriation in the one case, must surely justify regulation in the other.*

II. THE LEGISLATIVE CONSENSUS.

The legislative conviction that "the foundation of public welfare" required the regulation of rents at the seat of government was not a sudden intuition. It was preceded by an elaborate "investigation of prices, rents, and related subjects in the District of Columbia," made by the Senate District Committee pursuant to the resolution of July 15, 1919 (S. Res. 150, 66th Cong., 1st sess). A considerable mass of testimony was taken by a special subcommittee. In their summary and review of the hearings (afterwards embodied in the report of the full committee), it is pointed out that—

> The housing and rental problem in the District of Columbia has *for more than a year and a half* been recognized as extremely grave and has been the subject of extended discussion and proposed legislation in both houses Congress as well as newspaper and public comment. (S. Rept. 327.)

It was the chairman of that subcommittee, Senator Ball, who, on September 11, 1919, introduced "A bill to create a Rent Commission of the District of Columbia" (S. 2992, 66th Cong., 1st sess.) The bill was afterwards combined with the bill for amending the Lever Act. Its provisions were extensively debated in both Houses and became the subject of two conference reports (H. Rept. 349; H. Rept.

369). Finally, after thorough revision, it became a law as Title II of the act amending the Food Control (Lever) Act.

The 18 months mentioned in the report had not been taken up with discussion merely. As early as May 31, 1918, an attempt had been made to cope with rent profiteering by means of the Saulsbury resolution. (40 Stat. 593.) But it had proved defective in three important particulars. (1) It continued existing occupancy without providing for any adjustment of rents. (2) It did not prevent profiteering in the letting of houses thereafter falling vacant. (3) It wholly failed to reach one of the most flagrant abuses, viz. profiteering in subletting. Thus the present regulatory act was the fruit not of discussion only, but of experience.

It would have been strange, indeed, had Congress failed to take cognizance of notorious conditions which although accentuated in the District of Columbia, were forcing the attention of legislative bodies elsewhere.

Even before the World War, most large centers of population, especially in Europe, had shown ominous signs of a housing shortage. But with the gradual development of the economic consequences of the war, the housing problem assumed, in one place after another, the proportion of a veritable crisis. Building construction, more than most other activities, suffers an immediate shock when the whole energies of any people are concentrated on the single task of

winning a war. It is affected not only by the direct, but the indirect consequences of economic mobilization. In this country, as previously in France and England, the diversion of labor, raw materials and capital into forms of production more directly connected with war activities produced a practical cessation of building operations. It is important, moreover, to note that the injurious results follow rather than accompany the war. In the case of nonconsumable commodities, such as buildings, where there is a large permanent stock, the interruption of supply is not always immediately felt. But, as the existing stock is absorbed by a constantly accelerating demand, the situation becomes increasingly acute, until at length those who hold the existing stock acquire a position of virtual monopoly. Thus it came about that, notwithstanding that the concentration of new employees here followed very quickly upon the declaration of war "the housing problem in the District of Columbia," as the Senate committee reported, "did not become acute until the spring of 1918."

Before this act was passed the general situation had become such that the Senate committee could say:

> The present shortage of housing facilities is not, of course, peculiar to this community, but is more or less general throughout the entire country, especially in the larger cities, notably New York, where vigorous methods were adopted by the municipal authorities to check profiteering in rents. (S. Rept. 327.)

Indeed the problem was widespread enough to engage the attention of legislatures in States like Maine, having no congested industrial centers. An act of that State passed November 9, 1919, provided severe penalties for "anyone who demands or collects unreasonable or unjust rents * * * or imposes unreasonable or unjust terms or conditions for the occupancy of any building rented for dwelling purposes." [1]

Conditions naturally enough were extremely acute in New York. In April, 1920, the assembly following an exhaustive inquiry passed a series of acts grounded upon an express legislative declaration that a public emergency existed in the large cities owing to the exaction of unreasonable and oppressive rent agreements under conditions "whereby freedom of contract is impaired and the public welfare, health, and morals endangered." (Laws 1920, chs. 136–145.) The legislation having proved only partially effective the governor called on September 20, 1920, an extraordinary session of the legislature for the sole purpose of dealing with this subject. Upon the report of the joint legislative committee which had been investigating the matter for months, the acts passed at the April session were revised, amplified, and strengthened. (Laws 1920, chs. 942–953.)

These New York statutes will be examined later in connection with the decisions on them. They

[1] An act to prevent profiteering in the necessities of life and rents or charges for the occupancy of buildings for dwelling purposes and to provide penalties therefor and investigations thereof. (Acts 1919, ch. 256.)

are mentioned now simply to show the extent of the opinion that the renting relation in congested centers had come to transcend the limits of a mere private interest.

The Wisconsin Legislature was yet another to recognize the existence of a similar "public emergency growing out of the World War." In June, 1920, it enacted a rents law, which declared unlawful "every unreasonable or unjust rent, charge, or other term or condition for the use" of rental property in the large cities of the State, and empowered the State railroad commission to find and determine such "as shall be reasonable and just." (Laws Special Session 1920, ch. 16.) The Wisconsin statute is plainly modeled upon the rent regulatory provisions of the District of Columbia act. It differs from ours in making no provision for continuance of occupancy upon payment of the rent as regulated.

A number of other statutes might be cited in evidence of a prevailing opinion that the present abnormal housing conditions have affected the renting relation with a public interest, though some of them attempt to cope with the problem in other ways. Among such statutes are the New Jersey act (ch. 193, Laws of 1920) penalizing refusal to rent to a person because his family includes children under 14 years of age, and also annulling any stipulation avoiding a lease upon birth of a child, the law of the same State (ch. 357, Laws of 1920) requiring three months' notice to terminate a tenancy from month to month; and the Massachusetts act (ch. 555, Acts of 1920),

making it a criminal offense willfully to refuse to furnish heat, light, and other facilities implied in the lease of an apartment.

It may fairly be said, then, that the conclusion here drawn by Congress, so far from being baseless, has at least the collateral support of no inconsiderable body of reasoned legislative opinion.

III. THE BASIS OF REGULATION.

The court below disposed of all cases of regulated uses of property by saying that—

> the power to fix rental rates between private individuals *is not analogous* to nor controlled by the decisions which have upheld the power of the legislature to fix rates for service where the owner has devoted the business affected to a public use. In *Munn* v. *Illinois*, 94 U. S. 113, the owner of the grain elevator had for years *devoted* it to a public use in handling grain for *the public generally*. Rec. 29. [Italics ours.]

And the court adds that the same principal runs through all the cases. Rec. 29.

This passage is significant because it strikes the note of the whole opinion.

The insistent use of the word *devoted* indicates a rooted belief in the necessity of some conscious dedication of property to a use already recognized as public. That amounts to closing at once the categories of public interest. Yet this court has said "that the police power extends to all the great

public needs." *Noble State Bk.* v. *Haskell*, 219 U. S. 104, 111.

It is begging the question to say that the owner has not *devoted* his property to a public use. He has engaged in the business. The question is whether the legislature may reasonably hold that the resulting relation needs regulation. And the relation may be regulated after it has been entered into. *Louisville & N. R. Co.* v. *Mottley*, 219 U. S. 467, 482, 485.

Again, the court manifestly conceives the term "public use" as applicable only to a community use enjoyed by the "public generally." Thus it puts itself flatly in opposition to what was decided in *German All. Ins. Co.* v. *Kansas*, 233 U. S. 389. An offered service may be regulated, although the public has no right to demand the service.

In the third place, the whole implication of the opinion is that the renting of a building by one private individual to another is not a "service," and at any rate is not the business of rendering a service. This, too, we submit, is a basic misconception. Is not supplying an apartment or an office, together with the usual concomitants of heat, light, and janitor service, the rendition of a service? And what is true of an apartment is equally true of an ordinary dwelling, for the essence of the service is shelter, and shelter—which is as much a necessity as bread—is but the purchased use of a fixed facility.

Since, moreover, the very nature of the undertaking requires the offer of the service to others for compensation, it is necessarily a business. The proprietor of an apartment house is in the business of renting out shelter. In the same situation stand the few thousand individuals in any great city who, owning buildings they do not, and do not intend to, use, provide shelter for the many hundreds of thousands who constitute the public served. It is, moreover, a business which, as everybody knows, is concentrated in the hands of a small number of real estate agents or so-called realtors.

How, then, can it be said that there is no possible analogy between the renting of houses and other regulated businesses? We submit, with deference, that it is, on the contrary, quite obvious that the business of renting out apartments, offices, and houses under the conditions existing at the date of this act discloses the same fundamental elements that are found in all other cases where a public interest has been held to warrant the regulation of a business not enjoying any special privilege by statute.

While, as this court has so often said, the circumstances giving rise to such an interest are infinitely various and perpetually changing, the condition which finally emerges from them is a state of virtual monopoly, or, conversely stated, *an absence of effective competition*. In all such cases the consuming public stands in a position of economic helplessness. Such

a "monopoly in fact" (to borrow the expression used in Justice Brewer's protest against *Budd* v. *New York*) need not result from any special privilege. Suppression of effective competition may be the consequence of purely economic factors, either on the side of supply or on the side of demand.

On the side of supply, it may result from limitations which are natural in the physical sense, as in the case of water, natural gas, etc. *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347; *Van Dyke* v. *Geary*, 244 U. S. 39, 47. Or, it may result from limitations which are natural only in the sense that, under the circumstances of a given community, the locations or sites available for the particular purpose are necessarily few and not susceptible of multiplication or enlargement. Competition, therefore, can not effectively regulate their use. Such are the grain-elevator and stockyard cases, in which proximity to, or connection with, other transportation facilities is often a principal factor. *Budd* v. *New York*, 143 U. S. 517, 531, 535; *Brass* v. *North Dakota*, 153 U. S. 391, 402. Although in these cases there is no rigid physical limitation as in the case of water or gas, and the creation of new facilities is always theoretically possible, a virtual monopoly ensues, and it becomes necessary to regulate the prices charged by those who enjoy it.

But the controlling factor may lie on the side of demand. There may come into existence an immediate and highly intensified demand for some human

necessity which, though not itself artificially or naturally limited, can not be supplied in adequate measure by the usual economic processes. In this case, also, if the necessity is fundamental, if the need is instant, and there is no economic substitute available, there ensues a condition having all the economic and social consequences of a virtual monopoly. *Am. Coal Min. Co.* v. *Special Coal & Food Commission of Indiana* (U. S. D. C., Baker and Evans, Cir. JJ., Geiger, Dist. J.). 268 Fed. 563, 568.

An everyday instance of the principle is the classic case of the innkeeper. Notwithstanding the enormous multiplication of hotels, the law deals with them in the same manner that it dealt with the isolated wayside inn. For the need of the traveler, as has been aptly said—

> will always be so immediate that, did the law not interfere in his favor, he would pay often an exorbitant price rather than be turned out into the night to seek other accommodations. He has no power to choose, no opportunity to bargain. 1 Wyman, Public Service Corporations, par. 106.

And though, in the ordinary sense, there is no monopoly in the bakery business, the dependence of the consumer is so immediate and complete that regulation may be his only safeguard. *Mobile* v. *Yuille*, 3 Ala. 137, 141.

The public interest arising from the existence of an instant need naturally receives a powerful extension in all periods of abnormal economic stress.

Such situations exhibit in varying degrees a genuine analogy to the distribution of food among the civilian population in a besieged town, or, under the conditions of modern life, the control of the distribution of food and fuel in a country whose economic resources are mobilized for war. Cf. *United States* v. *Standard Brewery*, 251 U. S. 210, 219. In the case of the town, at least, everyone concedes that regulation of the control and use of private property is demanded in the general interest for two obvious reasons: First, that there may be an economical and equitable and, therefore, the most advantageous utilization of the existing stock. Second, that the frightful and constantly accelerating intensity of demand may not generate limitless extortion with its inevitable inequalities, corruptions, and oppressions, its attendant physical suffering and mental distress—in a word, that it may not lead to the utter demoralization of the entire population. Whether this may be predicated of the larger as well as the smaller field would seem to be a question of fact. But whether confined to a town under siege or extended to a country mobilized for war, while the first reason may require regulation of distribution, it is really the second that demands limitation of price. Yet, assuming the state of facts to exist, no one would doubt that limitation of price is equally necessary and valid. And the obvious reason is that regulation of price is the most effective corrective of a condition of practical monopoly.

The analogy is not disposed of by asserting that the war is over, in fact if not in law. The regulation of rents at the seat of government was one aspect of the war legislation for the control of food and other necessaries. It was passed as part of an act amending the Lever Act of August 10, 1917 (40 Stat. ch. 53, p. 276), and was directed, like it, against temporary emergency. The true question, however, is not whether the war is over, but whether conditions which would have justified regulation during the war still existed when this Act was passed. The war power is but a transferred portion of the police power originally residing in the States, and in this District that power is at all times plenary and indivisible.

To concede that the power of rent regulation might exist as a war power is to concede our case. What would justify it as an exercise of legislative power in war but conditions of social fact which, whether arising from that emergency or some other, mark the emergence of a public interest?

> Although an emergency may not call into life a power which has never lived, nevertheless, emergency may afford a reason for the exertion of a living power already enjoyed. *Wilson* v. *New*, 243 U. S. 332, 348.

These considerations demonstrate, we submit, that there is one broad basic consideration in all these matters, and, secondly, that the question in any instance is always one of degree. Whether the stress of the situation has risen to the required height to make regulation necessary is a question of judgment.

It is a social judgment, which only the legislature is truly competent to make. *Price* v. *Illinois*, 238 U. S. 446, 451.

And in all these cases where the existence of virtual monopoly is recognized as superinducing a power of regulation—whether the subject matter be the distribution of a consumable thing, such as water or gas, or the utilization of a fixed facility, such as a grain elevator, a cotton gin, a wharf, or a dock—the situation presents this invariable concomitant, that, unless the public interest be recognized and protected, either the mass of population or some important element of it will stand in a condition of economic helplessness toward those who are the masters of the situation.

In such cases it is idle to talk about freedom of contract and the right of a man to do with his property what he pleases. There is no freedom of contract and the use of the property is not being made by the owner of it. It is the others who are using it. And the necessities of the situation, and the permanent needs of society as a whole, require that they use it.

The recognition of such conditions of economic dependence lies at the root of practically all the social and industrial legislation of our time. *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, 20; *Mullen* v. *Oregon*, 208 U. S. 412, 422; *Erie R. Co.* v. *Williams*, 233 U. S. 671, 704. Hopeless economic inferiority negatives freedom of contract just as virtual monop-

oly negatives free competition. The root idea is everywhere the same.

> It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute, and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or be secured in a night's accommodation at a wayside inn, or in the weight of a five-cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power. *German All. Ins. Co.* v. *Kansas*, 233 U. S. 389, 417.

IV. THE HOUSING SITUATION.

It can not be disputed that the housing situation in a city like New York or Washington presents all the features of a practical monopoly. There is a house shortage which amounts to a fixed and inelastic limitation of supply. The demand, on the other hand, is intensified and rendered acute by the rapid increase in population, the conversion of residence into business property, and the prac-

tical cessation of building operations during and immediately after the war. This intensified demand, however, is an emergency demand.

The present expansion is regarded as more or less temporary and subject to sudden and (economically speaking) unforeseeable change. The increased demand for housing therefore is not sufficiently stable and permanent to bring into play the private enterprise which would ordinarily respond by increased construction. The natural flow of capital through which the law of supply and demand is expected to relieve any unusual scarcity in a given commodity does not take place. The result is that the bidding is all on one side. The price is not fixed by "the higgling of the market." There is no competition between those who among them control the only available supply of habitation space. *In short, so far as the housing situation is concerned, the normal competitive system has completely broken down.* It is as truly nonexistent as in the business of furnishing transportation, water, gas, electric light, and other facilities which are universally recognized as proper objects of regulation. By reason of the rigid limitation of supply in the face of a sudden, intense, and imperative demand, the business of renting out living space presents a state of virtual monopoly.

And at the moment when it was checked by legislation it was bringing in its train the habitual evils of monopoly—arbitrary enhancement of prices, consequent lowering of the standards of living in

other directions, overcrowding dangerous to the public health, individual instances of intolerable extortion and oppression resulting in marked inequality of living conditions—in a word, a general disorganization of the economic life of the community. The circumstance obviously required a new application of the principle upon which the common law has never failed to regulate in the public interest whatever forms of business or uses of property have come to affect in a vital manner the indispensable conditions of normal civilized life.

Unique relationship of the District of Columbia.

The conditions evident in other congested centers of population are intensified in the District of Columbia. Here we have additional circumstances resulting from the special relation in which this community stands to the Federal Government. This is not to assert that Congress, in the exercise of exclusive legislative power over the Federal District, is free from any otherwise relevant constitutional limitation (*Callan* v. *Wilson*, 127 U. S. 540, 550), or that its police power here is in its nature more ample than that possessed by a State in respect of persons and property within its territory (*District of Columbia* v. *Brooke*, 214 U. S. 138, 150). It is but the recognition of the capital fact that the District of Columbia is a specialized area set apart primarily for the uses of the Government. It is but a tiny space and yet it is the constitutional seat of government of an immense empire. That

fact does not change the law. But it gives to matters of population, housing, and other ordinary economic relations a significance which they would not have elsewhere. The "Government at Washington" must live, and it must live at Washington.

Whenever this Government is forced, as it was forced by the exigencies of the war, to concentrate in this limited area a new army of civil employees out of proportion to the District's permanent population and beyond the expectation of any normal increase, such a great and sudden influx of population necessarily places the whole body of civil employees at the mercy of those who possess the available facilities for shelter and habitation. The tempting rise in rents thereby occasioned, imperils the security of all employees who do not happen to be protected by long leases. On the other hand, the newcomers, whose services are equally necessary to the Government, are confronted with the alternative of declining to come or of bidding against one another to the point where the proportion of income required for shelter threatens seriously to reduce the amount left for the other necessaries of life. It is a matter of common knowledge that the high rents paid by war workers resulted in conditions of overcrowding dangerous to health, and during the influenza epidemic, even to life. The obvious result of such a situation here is an immense dislocation which impairs, and may even imperil, the success of the administrative mobilization upon which may depend the very safety of the country.

Can it be denied that such special and peculiar circumstances, operating in this specialized area of rigid limits, may impart an exceptional character to the business of supplying facilities for shelter and habitation, and so to the ordinary relation of landlord and tenant? And does not this exceptional character at once remove all such relations out of the category of those whose substantial effects are assumed to be limited to the immediate parties? Is it not plain that, from the viewpoint of a legislature charged with the general well-being and security, these ultimate and secondary effects, if they do not wholly transcend the immediate effects, at least, create such a public interest in the relation as warrants regulation for the common good?

Juristically speaking, exceptional social circumstances are more important than exceptional physical circumstances, in that the latter have significance only in so far as they produce the former. Surely circumstances such as Congress deems to exist here are fully as significant in their consequences as those physical circumstances which have caused legislatures, with the high sanction of this court, to recognize in the arid States of the West the public character of uses which would elsewhere be confessedly private.

To these considerations may be justly added the fact that the sudden increase in use value accruing to the owners of real estate in the District of Columbia is a socially created value resulting exclusively from the concentration of the Government's war activities within the limited area of the Federal District. The

increase in the number of civil employees alone was from 35,477 to 94,556, without taking into account their families, the increased population needed to supply their common wants and the augmented stream of strangers coming to transact business with the several departments. It is not suggested, of course, that the origin of this increment of value justifies its confiscation. No one proposes to confiscate it. But it is submitted that it may be fairly considered among the reasons which justify its regulation as a means of doing justice as between owner and owner, as well as between owner and tenant. The new value society has here produced to the advantage of all possessing property susceptible of being used to supply the new demand, ought not to be unfairly and inequitably absorbed by such owners only as happen to be free from scruple. Profiteering, after all, is a practice which, for various social reasons, will not be indulged in by all classes of owners. Absence of regulation means gross inequality in the distribution of the total increment created by the new situation and the unjust enrichment of the few unscrupulous owners for whom "the sky is the limit." If there were not other reasons for the rents law, it might well be justified by its effect in *equalizing* the the benefits of an extraordinary situation as among the owners themselves. And when we come to look at the actual administration of the law by the Rent Commission, that is precisely the way it has worked out.

Regulation the only possible solution.

The court below argues that "if the Government needed the use of the property for the better conduct of the war, it had a remedy plain and adequate by the exercise of the power of eminent domain." (Rec. p. 32.) But if the Government's concern in the housing of its individual civil employees in time of war is not sufficiently direct to generate a public interest, how can it constitute a public use? Would it not have been insisted just as strongly that the expropriation of property for such a purpose was taking the property of *A* for the private use of *B*? The problem, moreover, was not confined to the housing of the employees only, but concerned their families and other classes of the population upon which they were dependent for the necessaries and conveniences of life. The objection really amounts to saying that, regulation being illegitimate, the true solution was the expropriation of all the buildings in the city and the reorganization of the entire community on the basis of state socialism.

V. REGULATION NOT DEPENDENT ON PERMANENCE OF MONOPOLY.

An argument urged against the view here taken is that "the true basis of public utility regulation is largely that of permanent monopoly," where it is possible for regulation to operate both for the protection of the utility and for the protection of the public. If the utility is exacting charges which are too high, in view of all the circumstances, regulation

operates to reduce them. When the charges fixed become too low, regulation operates to increase them. Houses, it is said, are not susceptible of regulation in this manner. When houses are too few, public regulation may, indeed, protect the user as against the owner. But when houses have become more numerous than is necessary to meet the actual needs of the renting public, no method of public regulation can maintain or increase rentals in order to obtain for the landlord a return upon the *whole investment* which he has made at an earlier period.

There is no warrant whatever for saying that permanence of monopoly is the basis of regulation. The whole argument rests on a familiar fallacy. It mistakes an apparent incident of one type of regulation for the essence of regulation.

Public regulation may sometimes be said to protect the investment in the utility, but only in the sense that it protects it against itself. It does not protect it against economic changes such as the objection suggests in the case of houses. That is not its purpose or its justification. Regulation is for the protection of the public against the abuses resulting from a monopolistic situation in fact. Even in the most ordinary type of public utility, there can never be any assurance that changes in the economic situation will not speedily destroy its existing monopolistic relation to the public. When the legislature subjects it to regulation, it can not foresee that the utility may not, by the progress of the arts, be brought into competition which will render its busi-

ness unprofitable and preclude any normal or adequate return upon the invested capital. Gas may have to give way to electricity; trolleys to motor transportation. In that event, regulation can not possibly protect the investment any more than it can protect the investment in a house. In fact, the very point has been urged by way of objection to the reasonable-return-on-fair-value theory of rate making as applied to utilities universally admitted to be subject to regulation. And plainly enough, the whole argument goes only to the considerations to be kept in mind in fixing a present rate. It does not go to the question of power. It would, indeed, be absurd if an existing monopolistic situation, however disastrous to the social welfare, could not be regulated unless it could be foreseen that the monopoly would be perpetual.

Here, as so often before, a familiar type of public interest (namely, that in an ordinary public utility) is set up as the measure of the State's police power. Once the existence of franchise or some other special privilege was put forward as the indispensable condition of public regulation because that feature happened to be present in the type people knew most about. (*Budd* v. *New York*, 143 U. S. 517, 541, 550.) Afterwards the existence of a general public use or demand was seized upon for the same reason. So now the concept of a public interest relation tends to become confounded with some feature, real or apparent, of ordinary public utility regulation.

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Since permanence of monopoly can not be predicated even of an ordinary public utility, the possibility of protecting the investment can not be the condition *sine qua non* of a public interest bringing into play "the least limitable of exercises of sovereignty." If it were, then fire insurance could never have been regulated; for there is manifestly no way in which insurance rates, any more than rentals, can be maintained by public authority in the face of economic contingencies such as the objection assumes in respect of houses. The economic need met by insurance, moreover, while widespread, is not of the same character as the need satisfied by an ordinary public utility. Indeed, this particular argument against rent regulation is but a restatement of the public-use argument urged against insurance regulation; for in both cases it amounts to saying that regulation is legitimate only where there is permanent legal or economic monopoly on the one hand and a general permanent and accelerating public use or demand on the other. That view could not prevail with this court (*German Alliance In. Co.* v. *Kansas*, 233 U. S. 389, 407), for it was quite apparent that there are businesses so directly affecting the public as to require regulation both of practices and rates, notwithstanding the offered service was not of the simple and relatively uniform character requisite for a permanent public demand in the ordinary sense. Certain common utilities, such as water, gas, telephone, telegraph, and transportation, do involve businesses

undertaking to satisfy a more or less general and permanent demand, where the service must be at the command of all alike without discrimination, and where, conversely, the dependent public may be forced to accept rates which will temporarily protect the investment against changes ultimately certain to impair its value. But this court was quick to recognize that the existence of a public interest is not confined to services of that character, and the proposed test was at once rejected as to insurance, where the nature and variety of the risks to be indemnified against clearly exclude the notion of a general public use or demand. (*German All. Ins. Co.* v. *Kansas*, 233 U. S. 389, 411.)

It may be remarked that the conception of a general public demand is, after all, something of an illusion. There is never a universal public demand for anything. However extensive it may be, the demand for a particular facility or service is always limited to some definite fraction of the community, This becomes evident as soon as one gets away from things like street railways, gas light and electricity, on which masses of the community are dependent. Indeed in many towns, electricity is used only by a small minority. The generality of the demand is clearly a matter of degree. It is a far cry from a street car to a taxicab. Warehouses and grain elevators are none the less subject to regulation, because the actual use of their facilities is limited to a small, though important, portion of the business community. Insurance is none the less affected

with a public interest because only relatively few individuals avail themselves of it, and they only under widely varying circumstances.

It may perhaps be objected that our discussion of the economic situation concerns itself primarily with the shortage of dwellings, whereas the statute extends as well to other classes of rental property. Undoubtedly, profiteering in living shelter was the principal evil. But it did not stop there. It involved both business and residence property, although in varying degrees. And each class of structures, for obvious reasons, reacts on the other. Conceding power to deal with the situation by regulating rates, whether it were wiser for Congress to make regulation apply uniformly to all rented buildings within this restricted area, would seem to be essentially a matter of legislative judgment.

Had Congress exempted office and business buildings, we should doubtless have had to meet the argument (actually urged in New York) that leaving them out was an arbitrary discrimination against property used for residence purposes. Cf. *Cusack* v. *City of Chicago*, 242 U. S. 526, 529; *Welch* v. *Swasey*, 214 U. S. 91, 106.

VI. DECISIONS ON THE NEW YORK HOUSING ACTS.

Reference has already been made to the New York acts of 1920 as evidence of the legislative consensus respecting the need for regulation. The constitutionality of these statutes having been sharply assailed, we have the benefit of a number of maturely

considered opinions by judges, both State and Federal, whose views are entitled to respect. Their bearing on the issues here will appear from a brief outline of the legislation.

(A) Chapter 942 suspends until November, 1922, all summary proceedings to recover the possession of real property occupied for dwelling purposes in a city of one million or more, or in a county adjoining such a city, on the ground that the tenant is holding over after the expiration of his term, except in the four following instances: (1) That the person holding over is objectionable; (2) that the owner is seeking to recover for the use of himself and his family; (3) that his purpose is to demolish, in order to construct a new building, plans for which have been approved by the proper authorities; (4) that the building has been sold to a corporation formed under a cooperative ownership plan whereby the shareholders take the apartments for their personal occupancy. Chapter 947 provides that ejectment shall be maintainable only under substantially the same conditions. The conjoint effect, therefore, is to withdraw, for about two years, all remedy for the dispossession of a tenant holding over, except for the special reasons stated.

(B) This indirect extension of the tenant's occupancy, however, is conditioned upon an obligation to make reasonable compensation, which is worked out in the following manner:

(*a*) Chapter 944 makes it a defense to an action for rent "that such rent is unjust and unreasonable,

and that the agreement under which the same is sought to be recovered is oppressive." (Sec. 1.) When this defense is interposed the plaintiff, upon pain of dismissal, is required to file a verified bill of particulars, setting forth gross income, purchase price, assessed valuation, taxes, interest charges, operating expenses, and such other facts as may affect the question of net income. (Sec. 2.) The tenant must pay into court an amount equal to the preceding month's rent or the amount as fixed in the agreement under which he entered. (Sec. 6.) If the tenant fails within five days to satisfy a judgment in the landlord's favor, warrant for possession issues. (Secs. 5, 6.)

(*b*) Chapter 945 confines for the same period summary proceedings for nonpayment of rent to cases in which the petitioner proves that the rent is no greater than the amount for which the tenant was liable for the preceding month. The tenant may interpose the defense that the rent is unjust and unreasonable and the agreement oppressive, whereupon the landlord must file a bill of particulars like that required under chapter 944. The chief purpose of this chapter is to make judgment for rent under chapter 944 the sole remedy wherever rent is increased over the preceding month's rate.

(*c*) This housing legislation, as originally framed, created a presumption that a rent agreement is unjust, unreasonable, and oppressive if the rent is increased more than 25 per cent over that existing a year before. (Ch. 136.) As amended in September,

1920, the same presumption is raised if the rent is increased at all over that existing a year before. (Ch. 944, sec. 3.)

The effect of these statutes, taken together, is that a tenant can not be dispossessed until November 1, 1922, except for one of the four special reasons stated, unless he refuses to pay rent which has not been increased during 12 months, or which the landlord can prove, to the satisfaction of a court or jury, to be fair and reasonable. Thus the only way in which a landlord can obtain an increase is by bringing an action for rent and obtaining a judgment sustaining its reasonableness. Then, if the tenant fails to pay, he may get possession. In this indirect way the extension of occupancy is made ultimately conditioned upon fair and reasonable compensation.

These statutes manifestly differ from ours in several important particulars: (1) No machinery, such as we have been accustomed to see in other exercises of the power of regulation, is provided for the uniform and systematic application of the standard of reasonableness. (2) The determination of a fair charge is made incidental to the exercise of a court's ordinary function in respect of the recovery of debts or the restitution of possession. (3) A presumption is raised against any increase, which presumption the landlord may be required to overcome by affirmative evidence to the satisfaction of a jury. (4) Buildings subsequently constructed are exempted.

The New York acts, therefore, raise many questions which do not arise at all upon our statute.

But, in the last analysis, both depend upon the same legislative power in respect of rent regulation. In that aspect, the New York acts have been completely sustained. While a few judges have condemned particular features, no court has found it possible to overturn the base on which the whole legislative structure rests, namely, the existence of emergency conditions destructive of freedom of contract and remediable only by an application of the police power in the form of rent regulation.

Four of the New York cases deserve particular mention.

Edgar A. Levy Leasing Co. v. *Siegel* (App. Div. 1st Dept.) arose under chapter 944. It was an action for rent under an agreement made before, but renewed after, the passage on April 1, 1920, of chapter 136, which first made unreasonableness a defense. The case thus involved the validity of both chapter 136 and chapter 944, the issue being the same as if the lease had been made subsequent to the latter. In holding the defense good, the court pointed out the extent to which the use of real property was already regulated:

> The owner of real estate in a densely populated area may lawfully be precluded from building thereon until plans in compliance with laws and regulations deemed necessary for the public health and safety have been filed and approved, and even after building according to existing laws the owner, while devoting his building to a particular

> private use, may be required to make changes and alterations therein deemed necessary for like purposes, no matter how burdensome, and his only alternative is to discontinue the use. (*Health Dept.* v. *Rector*, 145 N. Y. 32; *Tenement House Dept.* v. *Moeschen*, 179 N. Y. 325.)

Authority to extend regulation to rental charges was then put squarely upon the existence of a practical monopoly within the principle of *Budd* v. *New York*, 143 U. S. 517:

> The scope of the decision in *Budd* v. *New York*, *supra*, is emphasized by the fact that Justice Brewer dissented in a vigorous opinion, concurred in by Justices Field and Brown, and took the point that the power to regulate should be limited to monopolies of law, as where exclusive privileges are granted, and should not be extended to monopolies of fact, which may be broken at will by others, and he cites, as an illustration, the erection of an office building which may give for the time being a monopoly of the business, but which may be broken by others, and in such case, he was of opinion that it would not be competent for the legislature to regulate the rentals to be charged. It is quite conclusive, I think, that there may be a monopoly of housing conditions, and the legislature had before it facts presenting a *collective* monopoly of housing accommodations in an emergency from which no relief could be afforded through breaking the monopoly by new buildings for a considerable period of time, and where the

landlords although not shown to be acting in concert were quite generally taking advantage of tenants and thereby presenting an intolerable condition if the owners were to be left free to exact exorbitant rentals.

The case of usury statutes which is the ineluctable *crux* for all who deny power to meet extortion by price regulation was stated thus:

> No one questions the validity of the usury laws, which have existed from time immemorial for the purpose of preventing oppression by money lenders who, without regulation by statute, could take advantage of the necessities of those desiring the use of money and exact exorbitant amounts therefor. Those laws are, I think, analogous to that now before the court, which was enacted for the purpose of preventing similar oppression by those who during the emergency having many applications for leases not only from residents of the State whose welfare is its especial concern, but competing nonresidents, and are in a position to exact and are exacting unreasonable rentals, and are thus taking advantage of those who have no homes of their own and are obliged to submit to their exorbitant demands, for they are not free to contract because everywhere they turn for shelter they are met with like exorbitant demands.

P. ex rel. Rayland Realty Co. v. *Fagan* (App. Div. 2d Dept.) arose under the occupancy act (ch. 942). The owner had recovered judgement on May 7, 1920, but warrant for possession had been stayed

under the housing legislation passed in April. As a pending proceeding, the case, therefore, fell within the operation of the new act, and necessarily raised the question of its validity. Only one of the five judges was of opinion that the suspension of the remedy on this judgment for two years was invalid, and he was careful to add:

> I am not prepared to say that the regulation of rentals in a city like New York, where it is a condition of life that several million people shall have access to the limited amount of land included within the city limits, is beyond the police power of the State.

The principal opinion of Jenks, P. J., rested the decision flatly upon the police power to interfere with the use of property whenever such interference is demanded by a public necessity. He answered the contention that the temporary denial of possession was a taking *pro tanto* by saying that the statute neither touched the title, changed the user, nor deprived the owner of the income derivable therefrom. All it did was to control the use for a limited time by preventing him from changing "the person of the user simply from preference of another 'or for the purpose of taking advantage of a public emergency' to extort an exorbitant charge." The impairment of the use to that extent during a limited time and upon fair compensation was not the taking contemplated by the Constitution. It was simply such an impairment as may be made to meet a "controlling public necessity." Though the imme-

diate purpose might be to permit the property of *A* to be privately used by *B*, "the ulterior public advantage" justifying restraint of the usual right to repossess was the maintenance—

> of peace, health, and order against the consequences of the evictions of perhaps thousands of its law-abiding citizens so that they may become outcasts with no place to lay their heads? What consequences, in this densest city ever known, may not follow when the life and health of these citizens and their families face the peril of homelessness?

It should be stated that in *Guttag* v. *Shatzkin*, a case arising under chapter 947, the majority of the appellate division of the first department held the occupancy feature of this legislation bad. Admitting that an emergency existed authorizing the exercise of the police power, McLaughlin, J., argued that it was absurd for the legislature to hold, in effect, that if a tenant failed to pay rent at the present rate or at a reasonable rate judicially determined, the public welfare would not be endangered by his eviction, but that it would be endangered by eviction in all other cases of a tenant holding over. But this argument fails to note that the emergency aimed at is extortion and there is no extortion where the tenant refuses to pay a reasonable price. The fallacy must have arisen from the circumstance that the New York statutes are so framed as to make rent regulation appear incidental to occupancy, whereas the District Rents Act shows

them in their true relation, continuation of occupancy being plainly an auxiliary means of preventing extortion. Neither of the two grounds assigned for the majority conclusion in *Guttag* v. *Shatzkin* can, we submit, be supported. (*a*) Granting the power of a court to stay the issuance of possessory writs whenever an oppressive use is threatened and also the power of the legislature to make laws providing that such writs shall not issue where their execution would enganger public health, morals, safety, or order, it is said nevertheless that this legislation is an attempt to withdraw from a coordinate branch of the Government all jurisdiction in the premises for a specified period and is, therefore, an encroachment on the judicial power. How can a court's power to stay be superior to the legislative power to define the conditions of a stay? (*b*) The second reason given is that "suspension of all possessory remedies for two years" is a destruction of the obligation of the leasing contract. An appropriate remedy for performance being, it is said, an inherent part of every contract, there must be a remedy to recover the possession which the tenant agreed to surrender. In this argument, it will be observed, the court makes no distinction between leases made before and after the statute. Manifestly in the latter the statute itself is a term. But the argument seems basically unsound. The court admits that the legislature may "suspend generally for a limited time remedies for the enforcement of contract rights by money judgments and

executions" (*Hoffman* v. *Charlestown Five Cent Savings Bank*, 231 Mass. 324), but insists that it may not suspend "all remedies of the owners of a partiular class of property for recovering possession according to the terms of the contract under which possession was surrendered."

But does not this beg the question? For if, as the court concedes, extortion in respect of "this particular class of property" may validly be checked by determining fair rents, then it is simply not true that landlords are deprived of "all remedies" for recovering possession when such remedies are suspended only in respect of those paying the lawfully adjudged fair rent during the time the landlord leaves the property in the regulated class. The remedies are modified only to the extent deemed necessary to make the acknowledged regulatory power effective. *Atl. Coast Line* v. *Goldsboro*, 232 U. S. 548, 557. The question whether conditional protection of occupancy is an appropriate means of aiding the regulatory purpose will be discussed in its proper place in direct application to our own act (third point).

Meanwhile, it seems important to note that the very court thus holding the possessory chapter invalid had completely sustained the chapters providing for the regulation of rents. *Levy Leasing Co.* v. *Siegel*, *supra*.

Both aspects of these statutes were before the United States District Court for the Southern District of New York in a suit to restrain their enforcement

in respect of an apartment house owned by a non-resident corporation. *Marcus Brown Holding Co.* v. *Feldman*, now on appeal to this court, No. 781, present term. The court's attention is invited to the opinion of Hough, Circ. J. (speaking as well for Myer and Augustus N. Hand, Dist. JJ.) in which all the constitutional objections urged against this sort of legislation are admirably discussed.

With respect to the point so much pressed, that it takes property for private use because it cuts down in the tenant's favor what the owner might otherwise get in the *open market*, it is answered:

> As matter of law we can not hold that the market value, or price, i. e., what is fetched when goods are bought and sold in the *ordinary* course of trade— *Muser* v. *Magone*, 155 U. S. 240—is for the use of real property anything different from that reasonable rent or use charge secured to the landlord by these statutes. We have nothing before us but the statute—no accusation is made that those charged with adjusting rent are rendering the acts unconstitutional by their practical interpretation of their duties thereunder.

When it is shown that the subject matter of these statutes is "historically appropriate for legislative regulation" (Freund, Police Pow., sec. 308), and that the exercise of reserved sovereignty in this field is not expressly and absolutely prohibited by the Federal Constitution as authoritatively construed, it follows that "the legislative result is

not forbidden where the purpose is within the range of the reserved sovereignty, the means appropriate, and the reason sufficient." Here the reason is patent. The purpose is clearly within the legislative scope. Whether the consequent restraint upon the owner's previous power to do as he pleased, the limitation of his income to a fair return, and even, by continuance of occupancy, the impairment of the tenant's covenant for peaceable surrender, are reasonable or not, resolves itself into the single inquiry whether the means employed are appropriate for the attainment of the legislative end. *Rast* v. *Van Deman*, 240 U. S. 342.

Space forbids quotation which would do justice to this opinion, but we may be permitted to add a short paragraph summing up the court's conclusions:

> Having examined the reason for these laws to the best of our ability, we hold it shown that an emergency existed, and that the resultant evil threatened to spread; that the legislative remedy is of a kind long known to the law, though not hitherto used in America; that the business affected is one capable of "superinducing the right of public regulation"; that the reason assignable for such regulation as embodied in the statutes challenged at bar is the kind of reason justifying this kind of statutes; and it being sufficient in kind, we are not, and as a court can not be, concerned with its sufficiency in degree.

Second Point.

The procedural provisions are not lacking in due process.

Assuming the existence of the power to regulate, our next inquiry is whether any of the provisions for the execution of the power is in conflict with the requirements of due process. The discussion under this head need not be extended. For practically all the adverse suggestions are foreclosed by familiar decisions.

No question, we take it, will be raised as to the power of the legislature, after laying down the standard of reasonableness, to confide its application to a quasi-administrative tribunal. *Louis. & Nash. R. R. Co.* v. *Garrett*, 231 U. S. 298, 305; *Interstate Com. Comm.* v. *Railway Co.*, 167 U. S. 479, 494; *Railroad Commission Cases*, 116 U. S. 307, 336.

The Rents Act does precisely that. It declares that all rents and charges for rental property, all service in connection therewith, and all other terms and conditions of the use or occupancy thereof, shall be fair and reasonable. All unreasonable or unfair provisions with respect to such rents, charges, services, terms, or conditions are declared to be contrary to public policy. (Sec. 105.) It then sets up a commission composed of three persons appointed by the President and by and with the advice and consent of the Senate. (Sec. 102.) The commission sits as a board. While the District assessor

is required to attend the hearings in the capacity of an "advisory assistant," he has none of the powers or duties of a commissioner. (Sec. 104.)

Manifestly the validity of each application of the legislative standard made by such a tribunal must be determined upon a consideration of its effect upon the return on the capital employed. No one has a right to complain of a determination who is not prepared to show that the rate fixed in his case is confiscatory in that it deprives him of a reasonable return on the fair value of his property. *Missouri Rate Cases*, 230 U. S. 474, 508.

Since this presumption in favor of the administrative determination can not arise if it be arrived at by proceedings lacking in due process, our primary concern is with notice and hearing. *Chicago, etc. Railway Co.* v. *Minnesota*, 134 U. S. 458. In this statute that requirement seems to be safeguarded in the most scrupulous manner. Cf. *New York Cent. R. R. Co.* v. *White*, 243 U. S. 188, 207–8. While the commission is authorized to determine reasonable rent on its own initiative as well as upon the application of the parties (sec. 106) it can do so only after adequate notice, either "personally or by registered mail" to all parties in interest (sec. 106). An open public hearing is required in that instance as in all other cases (sec. 106). Full opportunity is accorded the parties to adduce whatever testimony they may consider relevant. For that purpose, the commission has full power "to require

by subpœna the attendance and testimony of witnesses and the production of books" (sec. 105), and may invoke the aid of the District Supreme Court (sec. 106). Parties may be represented by counsel and have full privilege of cross-examination. Since the reasonableness of the exacted and the substituted rent is thrashed out after full inquiry in each individual case, the record thus made up includes what the owner relies on to show that the reduced rate would not be compensatory.

From any order making a reduction, as from every other determination of the commission, the statute provides a *direct* appeal to the Court of Appeals. (Sec. 108.) On such an appeal, the court may review, modify, or reverse the commission's determination for "error of law." Thus the parties are protected in respect of the ordinary elements of a fair and adequate hearing. The restriction to errors of law in criticized. But it would seem that the inquiry on such an appeal was intended to extend to the question whether the rate is confiscatory, for that is a question of law and finally for judicial and not administrative determination. The court, moreover, is given power to permit *additional evidence* to be adduced whenever reasonable grounds are shown for failure to adduce it before the commission. (Sec. 108.) This would be meaningless unless the intent was that the court shall consider the testimony and proofs in so far as they may tend to show that the conclusion reached by the commis-

sion is unsupported or that the rate fixed is not compensatory. *Detroit & M. R. Co.* v. *Comm.*, 235 U. S. 402, 405.

But if that is not the correct view of the scope of the direct appeal, an owner deeming the rental fixed to be confiscatory is not precluded or hindered by any provision of this act from seeking an injunction against its enforcement. *Prentis* v. *Atl. Coast Line*, 211 U. S. 210, 230. *Louisville, etc., R. Co.* v. *Garrett*, 231 U. S. 298, 311.

It is true that, pending a final decision on appeal, the commission's determination remains in force, no appeal being permitted to operate as a supersedeas. (Sec. 110.) But, considering that in each individual case the facts on the issue of confiscation *vel non* have already been fully developed before the commission, it would seem that the rate fixed may be made binding until reversed by the Court of Appeals, or until declared invalid by a court. If the question of confiscation is open on the direct appeal, the owner has a speedy, safe, and adequate remedy in the Court of Appeals. If not, then the provision about the rate remaining in force is of no consequence, for the owner is at liberty to obtain an immediate injunction if the facts warrant it, and he has them already at hand in the record before the commission.

With respect to the scope of the direct appeal, while a determination fixing a rate is legislative in its nature, we take it that Congress, exercising exclusive power of legislation over the Federal District, is not precluded from combining in the same tribunal

powers which partake, to a limited degree, of the nature both of judicial and legislative functions. *Detroit & M. R. Co.* v. *Michigan R. Comm.*, 235 U. S. 402, 404. If the true construction be that the Court of Appeals is to pass upon the confiscatory effect of the rental upon the evidence adduced before the commission, *and such additional evidence* as the parties may adduce under section 108, the court would be in the exercise of judicial functions. The findings of the commission are in the nature of findings of fact, which, if supported, may be made conclusive as to everything save the ultimate questions of confiscation. It is difficult to see in what way the Rent Commission differs in its relation to the judicial power from the Interstate Commerce Commission, or railroad or public utility commissions in States not having an express and rigid separation of powers. *Prentis* v. *Atl. Coast Line*, 211 U. S. 210, 227.

Nor is the relation less legitimate if we assume that the question of confiscation is not to be considered matter of law within the meaning of the direct appeal section. For in that event the provision forbidding a supersedeas simply drops out so far as this issue is concerned. The action of the commission, whether appealed from or not, is an administrative order only, and the Supreme Court of the District, a court of general jurisdiction, may stop it from going into effect whenever a sufficient *prima facie* case is made out against it. *Wadley Sou. Ry.* v. *Georgia*, 235 U. S. 651, 668.

It seems advisable at this point to note some objections which tacitly conceding power to regulate are yet urged against certain of the regulatory features:

(i) The first objection goes to the commission's authority to substitute a regulated rental for one fixed by private contract prior to its order or, indeed, prior to the passage of the act. This, it is said, constitutes an impairment of the obligation of the existing lease and a deprivation of the owner's property right therein. This objection is but another form of the general objection that regulation impairs freedom of contract. The law with respect to this question is "so settled as not to merit further discussion." *Union Dry Goods Co.* v. *Georgia P. S. Corp.*, 248 U. S. 373, 374. If Congress is right in holding that emergency conditions have brought the landlord and tenant relation within the scope of the police power manifestly all contracts, whether made before or after the act, must be "understood as made in reference to the possible exercise of the rightful authority of the Government." Id.

(ii) The second objection is that owners are denied the equal protection of the laws by that provision which allows a tenant, but denies a landlord, the privilege of petitioning for a revision of rent before the expiration of the lease. The discrimination is more apparent than real.

(*a*) Congress, as the lawmaking body of the District, was aware that the habitual mode of leasing small dwellings was by tenancy from month to month,

determinable by 30 days' notice to quit, expiring with the month. (Code, sec. 1219.) It was equally aware that dwellings and apartments of the better class were generally leased for one year only, and that holding over did not, as in many States, renew the term but resulted in a statutory tenancy at sufferance, determinable upon 30 days' notice. *Morse* v. *Brainard*, 42 App. D. C. 448; Code, sec. 1225. These two forms cover the great mass of residence property, and even with respect to business property, the usual lease, like the usual mortgage, did not exceed the period of three years. Congress also knew that the local leasing year commonly began on the 1st of October.

Thus Congress was well aware that any *unexpired* lease likely to be affected by the statute would, in all human probability, be one created since the housing shortage became acute in the spring of 1918. In the light of the indisputable economic situation, there was a fair presumption of adequate rental as against a landlord arising from his having leased at the stated figure; whereas, no presumption in that regard could arise against a tenant, who manifestly stood in an economic position of marked inferiority. **Could not Congress rationally infer that landlords in general had obtained the full benefit of their vastly superior economic position in the rents fixed by them?** If such be the case, there can be nothing arbitrary in refusing landlords the privilege of applying for an increase during the term, while granting the privilege to the tenant.

The legislature is free "to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be the greatest." *Miller* v. *Wilson*, 236 U. S. 373, 382; *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224, 227.

Since Congress has authority to regulate a rate, notwithstanding its having been previously fixed by private contract and therefore to permit the regulatory power to be invoked by a tenant seeking the reduction of an alleged extortionate rate to the basis of reasonableness (*Siler* v. *Louisville, etc., Rd. Co.*, 213 U. S. 175, 197), the exercise of the power is not inhibited because a corresponding privilege of invocation is denied landlords upon known differences in situation affording a reasonable ground for classification. *Am. Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 92; *Booth* v. *Illinois*, 184 U. S. 425, 429; *McLean* v. *Andrews*, 211 U. S. 539, 551, 552; *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62–63; *Bosley* v. *Mclaughlin*, 236 U. S. 385, 395; *Miller* v. *Wilson*, 236 U. S. 373, 382; *Miller* v. *Strahl*, 239 U. S. 426, 434.

When the statute comes to deal with the situation *after the* expiration of a term, and at a time when other provisions are operating to keep the tenant in possession against the will of the landlord and under conditions not contemplated by him, it is no longer possible to draw any such inference, and the legislature accordingly places both parties upon a footing of equality. Either may petition for revision of the rent.

(*b*) Even if the facts known to the legislature can not be regarded as affording a reasonable basis of classification, it does not follow that this provision works the total invalidity of the regulatory provisions. There is little difficulty in so construing it as to confine its entire operation to leases made after the enactment of the law. Note its language:

> Such complaints may be made (a) by or on behalf of any tenant, and (b) by any owner except where the tenant is in possession under a lease or other contract, the term specified in which has not expired, and the fairness and reasonableness of which has not been determined by the commission. (Sec. 106.)

It is quite possible to read the modifying clause "except where, etc.," as applying to both the antecedents (a) and (b). That is, to complaints "made (a) by or on behalf of any tenant, and (b) by any owner." In truth, a comma after "owner" would probably have made that the preferable construction. Upon that construction, no rent is open to revision where the term has not expired.

It is not necessary to say that this was the conscious purpose of the draftsmen. But where the issue is the saving of a great remedial act by confining its operation within the constitutional scope, there are many precedents doing greater violence to the text than the alternative construction here suggested. *El Paso & N. E. R.* v. *Gutierrez*, 215 U. S. 89, 97.

(*c*) It may be added that, instead of simply eliminating all rent revision during an unexpired term, it seems possible to adopt a construction which will throw open the whole question of the reasonableness of a rent whenever the tenant invokes the jurisdiction of the commission. Since the power and duty of the commission is to fix a reasonable rent, a tenant applying for revision in anticipation of a reduction, could not complain if the reasonable rent turned out to be more than that fixed by the lease. The effect would be this: Either the landlord would continue undisturbed throughout the term, receiving the rent fixed by himself, or, should the tenant apply for a revision, the landlord would have an equal opportunity for revision on the basis of reasonableness.

(*d*) But if we concede every objection urged, the net result is merely to eliminate the provision permitting readjustment of rent during an unexpired term. Clearly that would not destroy the whole act as a regulation of rentals. The corresponding feature of the New York acts is confined to subsequent leases. The general operation of our act is by no means dependent upon allowing rents to be revised during an existing term. Congress has been at great pains to make it clear that the diverse operations of the statute evidence severable legislative intentions. (Sec. 121.) In this way, it has expressly negatived any influence "that it would not have enacted that which is within, independently of that beyond, its power." Of course the plainest

declaration of a separate purpose can not make severable that which is inextricably interrelated and mutually dependent. But where separation is logically possible, the legislative declaration of intention ought to be conclusive. Had this act been so framed in the first instance as unmistakably to confine its rent regulating operation to charges for occupancy after the expiration of leases existing at the date of its enactment, would it not have been given effect as a complete and self-consistent law? If so, why is it not equally valid when it has the same operation after the elimination of the challenged provision? *Vial* v. *Penniman*, 103 U. S. 714, 717; *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362, 393, 396; *Berea College* v. *Kentucky*, 211 U. S. 45, 54; *El Paso & N. E. R. Co.* v. *Gutierrez*, 215 U. S. 87, 97.

(iii) Still another objection is that the Rent Commission's authority is not confined to regulation of charges for rental property, but extends to "all service in connection therewith, and all other terms and conditions of the use or occupancy thereof." (Sec. 106.) Can it be possible, it is argued, that Congress may, in general terms, empower a commission to eliminate any provision in a lease or other contract for the use of real property that may strike them as unreasonable? If the authority is to be exercised in advance by general order, is it not a delegation of legislative power? Or, if it is to be exercised in each particular case after the contract has been made, is it not a delegation of judicial power?

The objection assumes that the provision gives the commission power, without legislative standard of any kind, to make and unmake contracts and alter the nature of established interests in lands. The rôle assigned to the commission is much more modest. Congress has declared that "any unreasonable or unfair provision in a lease or other contract for the use or occupancy of such rental property with respect to such rents, charges, service, terms or conditions" is contrary to public policy. (Sec. 106.)

It seems plain that the authority given the commission to pass upon the reasonableness of the terms and conditions of occupancy is by way of supplement to regulation of the rental.

In other words, the intention was to authorize the commission, by applying the legislative standard of reasonableness, to stop practices which, if unchecked, would make regulation of the rent nugatory. And, in fact, unless we are misinformed, this power has been exercised only in cases of that kind. For example, where an apartment-house owner, whose charges the commission had held grossly extortionate and ordered reduced, immediately withdrew from the complaining tenants common and usual services, such as hot water, elevator service within accustomed hours, adequate heating, light in the corridors, and similar facilities which are, perhaps, implied terms in the letting of an apartment but are not usually specifically stipulated for.

The things that Congress was here aiming at are just the oppressive and fraudulent practices against which, under similar circumstances, the New York Legislature found it necessary to enact a statute in April, 1920 (Laws 1920, ch. 131), and still another in September (Laws 1920, ch. 951). These acts make it a misdemeanor for a lessor to fail to furnish hot or cold water, heat, light, power, elevator service, telephone service, or other facility, at any time when the same are necessary to the proper or *customary use* of the building, in all cases where the lease or rental agreement, *by its terms, express or implied*, requires the furnishing of those facilities.

Viewed as an authority to prevent the insertion, *in leases made subsequent to the act and in violation of the public policy therein declared*, of unreasonable, fraudulent, and oppressive clauses depriving tenants of customary facilities implied in the nature, if not expressed in the terms, of the leasing contract, the argument against the act, grounded on doubts as to the validity of this particular provision, loses its force. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 553.

(iv) What has just been said would seem to apply as well to the section relating to standard forms of leases.

Section 117:

> The commission shall prescribe standard forms of leases and other contracts for the use or occupancy of any rental property, hotel, or apartment, and shall require their

> use by the owner thereof. Every such lease or contract entered into after the commission has promulgated a form for the tenancy provided by such lease or contract, shall be deemed to accord with such standard form; and any such lease or contract in any proceeding before the commission or in any court of the United States or of the District of Columbia, shall be interpreted, applied, and enforced in the same manner as if it were in the form and contained in the stipulations of such standard form.

In the absence of actual application of this section, it would not seem profitable to speculate as to what questions might arise upon it. It can not be assumed that it was the intention to authorize the commission to alter the existing law with respect to the kinds of tenancies in the District. Congress was aware that in the usual lettings, whether for a term or from month to month, custom had already reduced the stipulations in general use to practical uniformity. Here again the object was doubtless to prevent landlords from inserting fraudulent or oppressive clauses likely to defeat regulation of the rent.

Although extending in form to all kinds of rental property, Congress had chiefly in mind facilities characteristic of apartments where the landlord's control of a central service plant places tenants in a position of peculiar dependence. Hotel and apartment-house proprietors, it was thought, could not be left free to use the very economic power, which

made rent regulation necessary, as a means of coercing tenants to agree in advance to stipulations which would render regulation of the charge itself perfectly futile. In truth, Congress may very well have been thinking of stipulations such as the one sought to be introduced by many apartment landlords about that time. It was designed to free the landlord from all responsibility for failure to keep an apartment heated, leaving the tenant (unless he could prove wilful neglect to procure coal) bound for the whole year's rent without reduction or claim for damages, even though he were forced to abandon the premises or find some way of heating them at his own expense. Surely a stipulation of that kind is unfair and oppressive and violative of the policy declared by the act. If so, would it not be legitimate to preclude this and similar practices by means of standard forms framed, after due inquiry and subject to court review, by a commission peculiarly cognizant of local conditions of use? The judgment to be exercised would not seem any more difficult than the determination of good or "bad business repute" or "illegitimate business" under a blue-sky law. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 550, 553.

Until a case actually arises under section 117, it is hard to speculate about its scope and application. It stands in immediate juxtaposition with the provisions for fixing schedules of fair and reasonable rates for hotels and apartments. In respect of the former, at least, accommodations and services

clearly form part of a general service owing uniformly to a recognized class of the public, and would seem to be fit subjects for reasonable regulation by municipal ordinance. In the District of Columbia, Congress is free to choose any agency it pleases to exercise the power of local police.

In all events the provision is clearly severable. It may be excised as with a knife. It would not seem that the conjectural invalidity of this section of the act should be held *in advance* to "affect, impair, or invalidate the remainder thereof." (Sec. 121.)

> Of course, the argument to sustain the contention is that, if the statute embraces cases such as are supposed, it is void as to them, and if so void, is void *in toto*. But this court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the State court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now. *Yazoo & Mississippi Valley R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219.

Third Point.

Temporary continuance of occupancy is an appropriate means of making rent regulation effective.

It seems unfortunate that the constitutionality of the District rents law should have first come up for consideration in cases presenting not the power to

regulate rental charges, but the power to continue the possession of the tenant. It is in this feature alone that the statute bears any resemblance to the Saulsbury resolution (40 Stat. 593) which was declared invalid in *Willson* v. *McDonnell* (49 App. D. C. 280; 265 Fed. 342). The discussion has been affected by an initial assumption that the two statutes are really similar (Rec. 28) when, in truth, the resemblance between them is purely superficial.

I. THEORY OF THE SAULSBURY RESOLUTION.

The Saulsbury resolution did not purport to regulate rents. What it did was to declare baldly that the existing possession of a tenant, except in certain exceptional instances, might continue at his option, notwithstanding the expiration of the tenancy. The consideration for the occupancy so continued was not payment of a fair and reasonable rent. It was payment merely of the rent fixed by the expired lease. No matter how long occupancy under the resolution might continue, it was beyond the power of the landlord either to increase the rent or to appeal to any tribunal for relief. Thus, the Saulsbury resolution provided neither for regulating rents on the basis of reasonableness, nor for continuance of possession conditional upon fair and reasonable compensation. Under those circumstances, it could be well argued that it operated to cut down, at the tenant's option, the landlord's reversionary interest by postponing until the conclusion of a treaty of peace his right to reenter and repossess himself of

his premises. For this transfer of a valuable interest, the resolution provided no consideration. For there could be no legitimate inference that rent fixed under wholly dissimilar circumstances for a term already past would be fair and reasonable for a future indefinite occupancy resulting solely from the resolution itself. Upon this view, the resolution deprived the owner of property without compensation. The Court of Appeals also pointed out that it discriminated in favor of owners of property unoccupied at its passage, or built or completed thereafter, since it was permissible for them "to exact whatever rentals tenants would agree to pay" and these would probably be substantially more than those paid by tenants in possession of like property. The court's conclusion, therefore, was that—

> The resolution before us is unreasonable because its necessary result is the taking of private property without compensation, and it is not uniform in its operation for the reason that it is not impartial within the class subject to its provisions. *Willson* v. *McDonnell*, 49 App. D. C. 280, 283.

II. THEORY OF THE RENTS ACT.

The Rents Act proceeds upon an entirely different principle. It declares that rents are subject to the rule of reasonableness, and provides machinery for adjusting them on that basis. Fair and reasonable charges are such as take into consideration the interest both of the public and the owner of the property. *Smyth* v. *Ames*, 169 U. S. 467, 546.

The rate fixed must in each case constitute a reasonable return on the fair value of the owner's investment. *Atlantic C. L.* v. *North Carolina Corp. Comm.*, 206 U. S. 1, 24, 25; *Northern Pac. R. Co.* v. *North Dakota*, 236 U. S. 585, 595. Under these circumstances, it is no longer possible to say that the landlord's reversionary interest is taken away. For, if the amount determined by the commission is reasonable (and the court will strike down any that is not), then the owner is compensated to the full extent of what he parts with, viz: The use-value of his property as rental property. If he does not wish it to be rental property, he is at liberty to withdraw it from that class. (Sec. 109.)

Being utterly unlike in principle, as well as in operation, the possible invalidity of the Saulsbury resolution can have no bearing on an act for the regulation of rents. "No rates uniform or otherwise, were prescribed by the resolution." *Willson* v. *McDonnell*, 49 App. D. C. 280, 283. Nor can the resolution have any real significance with respect to continuance under this act. For the latter makes such continuance conditional upon payment of reasonable rent, a matter with which the Saulsbury resolution was not concerned.

III. PROTECTION OF POSSESSION IN AID OF REGULATION.

Coming then to consider directly the question of occupancy, we submit that, if legislative power to regulate rentals be once conceded, one may legitimately infer therefrom an ancillary authority to pro-

tect the possession of a tenant paying a fair and reasonable rent and not otherwise in default, until such time as the landlord withdraws the property from the class of buildings offered for hire. And this, as we have seen, he may do by applying the property to his own use, or that of his family, or by improving it in order to rent again. (Sec. 109.)

(*a*) *Subsequent leases.*

With respect to leases made subsequent to the act, the proposition seems self-evident. The contract clause, of course, has no application. *Munday* v. *Wisconsin T. Co.*, 252 U. S. 499, 503. If Congress has power over the landlord and tenant relation in respect of charges, it manifestly has power to make it a statutory term in every tenancy thereafter created that a tenant, otherwise duly performing the conditions of his tenancy, may continue to occupy the property for a limited time upon payment of the regulated fair rent. *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 236. The same power which has created and defined the existing forms of chattel interests in land may alter or modify those interests, annex new incidents to them, and define the conditions upon which they may be brought into existence by act of party. *New York Central R. R. Co.* v. *White*, 243 U. S. 188, 196, 200. The only limitation is that the essential property itself shall not be taken away, and that is not done when the owner gets the fair and reasonable value of the use. Like all other matters touching control and use of land, the incidents of the landlord and tenant relation are

not primarily matters of private will but of fundamental social policy. The primary question is not what interests individuals may desire to create, but what interests the public welfare, as conceived by the lawmaking body, may safely permit them to create. In all real property relations such as vendor and purchaser, or mortgagor and mortgagee, courts (not to speak of legislatures) habitually apply rules which entirely defeat intent in order to enforce incidents which the law, for reasons of its own, has annexed to the relation. *Cheney* v. *Libby*, 134 U. S. 68, 78. So with the relation of landlord and tenant. No small part of the history of the law of real property is taken up with such things as the gradual recognition of the interest of the tenant at will as a true estate (P. & M. Hist. Engl. L., vol. i, p. 338), the introduction of the doctrine of emblements (Lit. ss. 68, 69), the development of the tenancy from year to year out of the tenancy at will (Bl. Com., ii, p. 147; Digby, His. L. Real Prop. pp. 244, 414), and the increasing protection thrown around the originally insecure estate of the termor (P. & M. Hist. Eng. L., ii, pp. 106, 109; Holdsworth, Hist. Eng. L., iii, p. 107, 180).

This is not to say that courts can now exert the same power to mold real property relations. But what judges formerly did in this field the legislature is free to do.

Take, for example, the familiar series of Maryland acts, beginning in 1884 and coming down to the last revision of the Code, making all leases or ground

rents for a longer period than 15 years created since stated dates redeemable after a specified time at the tenant's option for a sum equal to the capitalized value of the reserved rent at a stated statutory rate. Md. Code, art. 53, sec. 24–25; Md. acts 1884, ch. 485; 1888, ch. 395; 1900, ch. 207; *Stewart* v. *Gorter*, 70 Md. 242, 245; *Swan* v. *Hemp*, 97 Md. 686, 690. If the legislature can make it a statutory condition in every long lease that the lessee may extinguish the reversion by paying the capitalized value of the rent, it may equally impose a condition that the tenant may continue to occupy for a limited period upon paying a rent which will produce a fair return on the capital value. Clearly the public policy against irredeemable leases and in favor of free alienation of the fee, is of no higher validity than the public policy of protecting helpless elements of the population against oppression or extortion. *Arizona Employers' Liability Cases*, 251 U. S. 400, 423–424.

(*b*) *Prior leases expiring after the act.*

Only in respect of prior leases does there seem to be room for argument. As to tenancies created prior to, but expiring after the act, where the tenant has covenanted to surrender, it would seem that power to extend the occupancy is a reasonable corollary of the power to regulate the rental for these reasons:

The Rents Act proceeds upon the principle that every owner not using a building but renting it to another has dedicated it to a use which, although

primarily personal to the tenant, is here impressed with a public interest. The existence of this interest justifies regulation of the rent. Inasmuch as the amount payable by any new tenant must, like that paid by the former tenant, conform to the same standard of reasonableness, the owner can have no substantial and legitimate reason (other conditions of the tenancy being complied with) for withdrawing the service from one person in order to give it to another. The State, on the other hand, has strong reasons for preventing, as far as possible, threats of eviction being used to nullify regulation, as well as for checking the needless disturbance of the population upon which, directly or indirectly, it depends for the transaction of the Nation's business. Having power to see that no unjust, unreasonable, or unfair rent is exacted during the existing emergency, Congress, as an appropriate means of accomplishing the same purpose, may reasonably insist that the occupancy of one paying a reasonable rent be not disturbed without cause, so long as the owner leaves the property in the rental class.

What is there extravagant or arbitrary about this? In both instances the owner, being in receipt of the same reasonable rent, is equally compensated for the use which he parted with voluntarily and may yet resume whenever he pleases. Since he is fully protected in respect of all other incidents of occupancy (sec. 109), he can have no possible motive in dispossessing the tenant except the hope of extorting an

unlawful charge from a new and anxious applicant—the very thing against which the policy of the rents law is directed. Thus the protection of possession during payment of reasonable rent "has real and substantial relation" to the public object for which the rent itself is regulated. *United States* v. *Feryer*, 250 U. S. 199, 203, 205; *Jackson* v. *Massachusetts*, 197 U. S. 11; *Miller* v. *Wilson*, 236 U. S. 373, 380.

Indeed, the relation between the object and the means seems rather more substantial than many relations held to justify interference with freedom of contract. And it should be remembered that what is affected here is merely a right to contract. The owner's right to *use* the property is secured by the statute. (Sec. 109.) As long as he rents it he can not obtain a higher rent. All other conditions of occupancy are safeguarded. This provision, therefore, operates only to limit his liberty to contract; that is, his liberty "to choose his own tenant." So far as any express "covenant to surrender" is concerned, its impairment is merely incidental. What is being regulated is the present rent for occupation subsequent to the act. If the landlord does not wish that there should be any subsequent occupation, he has his old remedy. But if he does not wish to use, but to rent, then the whole matter resolves itself into a question of the fair incidents of the regulation of the rent. *Manigault* v. *Springs*, 199 U. S. 473, 480. The contract clause as such has no application and such an incidental impairment of the "surrender" covenant is not a deprivation of property.

Is not the incidental means here adopted quite as appropriate to the main legislative end as that considered in *Mutual Loan Co.* v. *Martell*, 222 U. S. 225, 231? If a man has any clear right, surely it is the right to dispose freely of the wages of his labor. Yet the statute there invalidated any assignment of wages unless the order were first accepted by the employer, consented to by the employee's wife, and recorded at the place of employment. This was a plain invasion of many fundamental rights. The claim for wages was *in personam*. He had a right to utilize it anywhere. By forbidding him to assign it except upon recordation at the *place* of employment, the wage earner became, as it were, *adscriptus glebae* or, rather, *vicinitati*. It was thus a limitation not only upon his property rights, but upon essential liberty of action as enjoyed by all other classes of the population. Nor was this all. A wife has no more legal title in the husband's wages than a held-over tenant has in the premises of his landlord. Yet the husband's inherent right of disposition of his own property was made subject to the exercise of the wife's volition on the general notion that a wife has an interest in the *right* use of the husband's wages. The circumstances that the wife would benefit by the statute did not make it invalid. The general social interest in the prevention of extravagance and improvidence was deemed sufficient to warrant the subordination of a clear and admitted right to dispose of one's property to the controlling operation of an interest having no legal existence. Yet this court

did not think the relation between the means and the end either arbitrary or unreasonable.

The same sort of indirect yet vital connection is found in many other cases setting limits upon the owner's power to dispose of his property. Take, for example, the statute in *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, *requiring* redemption in cash of store orders or other evidence of indebtedness issued in payment of wages, or that in *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, *prohibiting* the issuance of any order for the payment of labor unless redeemable in currency. Here the practical effect was to prohibit any payment except in cash. The admitted invasion of the domain of private contract was justified only by the secondary economic consequences of the prohibited practice upon a class standing, like the tenant class here, in a strategically weak economic position.

Rast v. *Van Deman*, 240 U. S. 342, is a striking illustration of the principle. There a common business practice, judicially sanctioned in many States, was strangled by prohibitive tax because of a legislative opinion concerning its remote "evil influence and effect." Although it could not be called in an exact sense a "lottery" or "gaming," it was "considered not unreasonable to regard it as having the seduction and evil of such" (p. 365). And whether it had or not was said to be a matter of inquiry and of judgment finally within the power of the legislature to make (p. 366).

Thornton v. *Duffy* (No. 76 of the present term) would seem to make further discussion unnecessary.

There a statute effectively subjected all employers of a stated class to a workmen's compensation system, permitting them, under certain conditions, to pay the regulated compensation direct to the employee without contributing to the State insurance fund. After plaintiff had obtained indemnity insurance against the burden thus imposed, the law was changed so as to take away this direct mode of payment from employers who insured themselves. What relation is there between a statutory system of workmen's compensation and the denial of an employer's ordinary right to indemnify himself against a contingent liability? Manifestly, nothing but the supposed inimical effect of reinsurance on the policy of the workmen's compensation law. Is this any more substantial or direct than protection of occupancy in aid of rent regulation?

IV. PREFERRING THE TENANT IN POSSESSION.

In appraising the appropriateness of the means here employed, it should be kept in mind that the landlord's ordinary power to contract touching the use of his property is not interfered with in favor of a stranger or any person not in privity with him. Occupancy is protected only in respect of a class generally recognized as having a natural equity beyond the technical termination of the term. Courts of equity have not hesitated to recognize this uncertain, yet valuable, interest (*Mitchell* v. *Reed*, 61 N. Y. 123, 135), especially when it has the support of local usage or special economic circumstances give it

peculiar significance. It was distinctly recognized by the equity courts in Ireland, where a great part of the land was held by leases depending upon lives with covenants for perpetual renewal, and where numbers of tenants, neglecting to make renewals in accordance with the strict terms of their leases and often guilty of great laches in that regard, were constantly being threatened with eviction. *Boyle* v. *Lysaght*, 1 Vernon & Scriven (Ir.) Rep. 135, 142, 144.

> And the courts of that country, presided over by very able judges, including Lord Chief Baron Gilbert, for a long series of years, and in numerous instances, did not hesitate to grant relief to the tenants upon condition of making just compensation to the landlords, where by mere neglect they had failed to demand renewals within the time specified in the leases. *Banks* v. *Haskie*, 45 Md. 207, 220.

Though the English House of Lords overturned the doctrine upon the strict view that a lessee who has lost his legal right of renewal can not have relief without proof of fraud or accident disabling him from applying according to the terms of the lease (*Murray* v. *Bateman*, Ridgeway's Cas. Parl. 187), it was almost immediately revived by statute. 19 & 20 Geo. III, ch. 30.

> It appears, however, that soon after the decision in *Bateman* v. *Murray* it was seen its effects would be so disastrous upon the interests of Irish tenants that Parliament interposed and passed the Irish tenantry act, which provided in effect that in all cases of

> mere neglect, where no fraud appears to have been intended on the part of the tenant, courts of equity should relieve upon adequate compensation being made to the landlord.
> *Banks* v. *Haskie, supra.*

The principle of the Irish decisions was applied in Maryland to cases arising under the system of ground rents prevailing there. It became the settled practice to grant specific performance of covenants to renew where the tenant was not guilty of fraud, notwithstanding he had lost his right to renewal by total failure to effect it during the term in conformity with the specific conditions of the lease. (*Banks* v. *Haskie, supra.*

In adopting the Irish doctrine, rather than the strict law laid down in *Murray* v. *Bateman*, the Maryland Court of Appeals was confessedly influenced by the conviction that the facts and circumstances of the economic situation had "raised a local equity here equally strong in favor of the lessees as the like facts and circumstances, more than a century ago, raised in Ireland" (*Id.*, p. 224).

We are quite aware that, in thus recognizing the tenant's natural equity, courts have felt constrained to proceed upon the basis of a real or supposed original intent of the parties, where it could be said that they were making "the instruments subserve the purposes they were designed to accomplish." But clearly, it was the equity that construed the intent rather than the intent that created the equity.

But the legislature is not thus limited in its recognition of this equity. On the contrary, it has been adopted as a sound principle of legislation in many instances, where the social order or the vital interests of a basic industry such as agriculture have been threatened with disaster through the unreasonable exercise of the landlord's strict right to evict upon expiration of the term. It lies at the base of much of the salutary legislation by which the British Parliament has endeavored, within the last 50 years, to remedy the evils of landlordism in Ireland. Landlord and Tenant (Ireland) Act 1870 (33 & 34 Vict. ch. 46); Land Law (Ireland) Act 1881 (44 & 45 Vict. ch. 49.) It animates the legislation for the relief of the Scotch crofters. Small Landholders (Scotland) Act 1911 (1 & 2 Geo. V, ch. 49).

All of this legislation proceeds upon the view that economic and social considerations may give rise to a right of renewal upon reasonable terms and with proper safeguards, and that wholesale evictions may be checked in the general interest though that may require the fixing of an equitable rent or the period of renewal by public authority.

It seems superfluous to follow the development of the recognition of the tenant equity through the statutes recently enacted in England for the purpose of preventing unreasonable increases in agricultural rents as well as in the rents of small dwelling houses. 5 & 6 Geo. V, ch. 97; 9 Geo. V, ch. 7; 9 & 10 Geo. V, ch. 90; 10 & 11 Geo. V, ch. 17; *Nevile* v. *Hardy*, 37 Times Law Rep. 129.

As already stated, argument seems unnecessary to show that, as to subsequent tenancies, Congress may so mold an estate for years or from month to month as to make it a statutory term that the tenant may have a renewal for a limited period upon payment of a reasonable rent. The question is with respect to leases made before but expiring after the act and having no provision for renewal. As to these, the cases and statutes referred to show that the natural equity of a tenant, though neither a certain contingent nor any other kind of estate, but a mere chance or reasonable expectation of fair dealing, is yet an interest of sufficient social importance to be taken into account in the selection of appropriate means for accomplishing the main legislative purpose—suppression of the evils consequent upon profiteering in rent.

At any rate, these cases seem to answer what is so commonly said against the occupancy feature of this act, namely, that it takes one man's property and gives it to another. There would seem to be a clear distinction between a law which would authorize a stranger to enter upon and use a building upon an undertaking to pay a fair rent and a law authorizing a tenant already in privity with the landlord, and not otherwise in default, to remain in possession for a limited period during a war-time emergency, when unrestricted power to evict would frustrate effective suppression of rent profiteering and intensify conditions already menacing public security.

V. WITHDRAWAL FROM THE RENTAL CLASS.

It is incorrect to say, as did the court below, that the landlord "is not only prevented from going out of the renting business, but is required to continue it upon the terms fixed by the act." (Rec. 29.) On the contrary, the statute leaves him entirely free to give up the rental business at any time.

For, manifestly, there is but one way to give up that business. That is to stop renting. It can not be that owners have an inherent right to turn out all tenants in order to keep the buildings vacant during a dearth of housing, when the necessary effect is to create a still more stringent artificial shortage leading to still more enhanced monopoly prices. One owning houses which he is accustomed to rent can really take them out of the rental class only by making use of them himself. In an emergency such as that declared by Congress, the right to regulate rents effectively can not be thwarted upon a ground so abstract and socially injurious as a theoretical right to evict tenants for the purpose of destroying the building or keeping it vacant. Considering the facts of actual life, the only rational way in which rental property can cease to be such is by substituting use by the owner for use by the tenant, or by withdrawing it temporarily from use in order to rebuild or improve it. For both of these contingencies the statute makes due provision. It is only while he rents that the owner is subject to its operation.

VI. EVIDENCE OF WITHDRAWAL.

The tenant's statutory option to continue his occupancy at a fair rent not being effective against the owner's right to withdraw the property from the rental class, it remains to consider the mode in which the statute permits withdrawal to be accomplished. It is by giving 30 days' written notice setting forth the facts constituting a case of withdrawal; that is to say, that the owner desires the property (*a*) for actual and bona fide occupancy by himself or his family, or (*b*) for the purpose of tearing down or razing the structure in order immediately to construct new rental property. (Sec. 109.)

And it is added that any dispute as to the accuracy or sufficiency of the statement, as to the good faith of such demand, or as to the service of the notice, is to be determined by the commission. (Sec. 109.)

But what is the effect of its determination? While the section provides "that the matters in dispute shall be determined by the commission upon complaint as provided in section 106," it does not expressly say that a determination on this issue shall have the same conclusive effect as one made upon complaint in respect of rental charges.

It is indeed true that section 106 makes all determinations of the commission conclusive on the courts, and if the effect of the reference to that section in section 109 is to make the same rule apply to determinations on this point also, then we are not averse to conceding that such a determination can not have that effect for all purposes.

It is important here to note a distinction. Authority to determine a reasonable rent necessarily implies authority to determine whether the structure is within the regulated class. On that question it would be competent for a court to say, whether conceding the facts found by a quasi-administrative tribunal, the notice under section 109 brought the property within the class. But section 109 has a double aspect. So far as the rent regulation is concerned, it marks the termination of the authority to regulate. So far as recovery of possession is concerned, it marks the existence of a right of property. In this second aspect the question is not whether a rent shall be regulated, but whether a person who has no right to possession, unless the property belongs to a specified class, may hold the owner out of possession until the latter proves that it does not belong to that class. For that purpose the inquiry whether the notice states a good case of withdrawal under the statute would seem to be an inquiry as to "the existence of past or present facts," upon which depends the exercise of a right of property. That is quite different from the fixing of a rate, which "is the fixing of a rule for the future, and is therefore an act legislative not judicial in kind." *Prentis* v. *Atl. Coast Line*, 211 U. S. 210, 227; *Louisville, etc., R. Co.* v. *Garrett*, 231 U. S. 298, 305. The ascertainment of the facts for the purpose of recovering possession is not the fixing of a rule for the future. It is an adjudication of a state of facts conditioning the right of possession.

On the first aspect of the matter it seems clear that the commission, subject to a court's view of the ultimate question of law, may be authorized in the first place to determine whether the property is or is not subject to further regulation. And, subject to that review, its determination may properly be made conclusive. In its other aspect, however, we do not claim that the determination can be made to control the issue of possession *vel non*, either with respect to the fact or with respect to law. We do submit, however, that the legislature may require a notice of the fact of withdrawal to be given, may prescribe a reasonable time for the purpose, and may further require the notice to be submitted in the first place for the determination of the commission, because, if valid, it marks the end of their authority.

On the other question, we conceive that the provision should be read as intending the commission's determination to be prima facie. When an action for possession is brought, the commission's adverse finding may be overcome by proof of the existence of a state of facts which, under section 109, establishes withdrawal and entitles the landlord to possession. *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412, 430; *Mills* v. *Lehigh Valley R. R.*, 238 U. S. 473, 481–482.

But this view of the matter does not have the effect of avoiding the statute *in toto* or in respect of the provisions authorizing continuance of occupancy. The legislative will, defining what shall be evidence of withdrawal from the rental class, may be given effect without treating the commission's determina-

tion as conclusive. It may be left, like any other rule of law, to be enforced by the courts. Under the existing law the landlord is entitled to dispossess the tenant upon the expiration of his tenancy, and is provided with a remedy for that purpose. The new statute, authorizing temporary continuance of occupancy in consideration of reasonable compensation, annexes a condition to the exercise of the right to repossess. That condition is that the property must be shown not to be within the category subject to regulation and hence, to continued occupancy. The landlord may not, therefore, avail himself of the remedy unless he establishes the requisite facts before the court authorized to afford the remedy. In short, judicial ascertainment of those facts is a condition precedent to the remedy. In that view, whether the commission's determination be treated as prima facie, thus throwing the burden of proof on the landlord, or whether it be denied any effect whatever, it ultimately remains for the court to exercise its ordinary function by determining, in accordance with the statute, whether the notice sufficiently states facts evidencing withdrawal from the rental class and whether the alleged facts are true. Only in that event can judgment for possession be awarded.

The circumstance that the commission lacks a jury is of no consequence. There is no jury in the Municipal Court, where the issue of possession is first tried. That the parties can have one on appeal is sufficient. *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 45. At the trial before that jury the com-

mission's finding on the notice would be but *prima facie* evidence. *Meeker* v. *Lehigh Valley R. R.*, 236 U. S. 412, 430.

CONCLUSION.

In conclusion, it is respectfully submitted:

I. That, under the circumstances recited in this statute, Congress has undoubted power to subject rents in the District of Columbia to reasonable regulation, and that the procedural provisions for that purpose lack no element of due process. It is hoped that whatever disposition may be made of the controversy between the parties on the record, the central operation of the act may not be left in doubt.

II. That continuance of occupancy until expiration of the act, conditioned upon fair compensation, is not open to serious question with respect to subsequent leases, and that, with respect to those made before but expiring after the act, the protection of a tenant paying the regulated rent is an appropriate means of attaining the main object of the legislation, in that it precludes eviction for the purpose of extorting unjust and unlawful rents.

III. That the latter feature of the act is, in any event, so clearly separable from its regulatory operation that it should not, for any reason, be permitted to invalidate it.

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